United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

355

BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,746

United States of America,

Appellee,

v.

Billie A. Bryant,

Appellant.

Appeal from the United States District Court
for the District of Columbia

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Counsel for Appellant
Appointed by this Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

*Cases chiefly relied on are marked by asterisks.

Cases:

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*Cases chiefly relied on are marked by asterisks.

Page

Miscellaneous:

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BRIEF FOR APPELLANT

Statement of Issues

1. Whether Bryant's conviction must be reversed because the District Court tried the case in a district saturated with publicity prejudicial to the Defendant after the court had granted a motion for change of venue.

2. Whether Bryant's conviction must be reversed because the District Court denied him the right to interrogate prospective jurors individually on voir dire.

3. Whether Bryant's conviction must be reversed because he was tried on an indictment after the District Court had dismissed all the counts in the indictment.

4. Whether Bryant's conviction must be reversed because the Court drew a jury from a group of jurors which had been misled, or contaminated, by the prejudicial remark of another judge.

5. Whether Bryant's conviction must be reversed because the Court permitted the evidence of prior crimes to be given to the jury.

6. Whether Bryant's conviction must be reversed because the District Court refused to give the jury the proposed instruction regarding Defendant's mental condition as precluding premeditation.

7. Whether Bryant's conviction must be reversed because the Court instructed the jury that premeditation might be instantaneous.

* * * * * * * * * * *

This case has not previously been before this Court.

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REFERENCES TO RULINGS

None.

STATEMENT OF THE CASE

1. The indictment.

On February 11, 1969, a Grand Jury of the U. S. District Court of the District of Columbia returned a presentment reading in its entirety as follows:

"Billie A. Bryant
18 USC 1111a, 1114
22 D. C. Code 2401".

Thereafter the U. S. Attorney prepared an indictment charging Billie A. Bryant, Defendant-Appellant herein, with four counts of first degree murder. These were as follows:

First count, that Defendant on January 8, 1969, within the District of Columbia, wilfully and with premeditation and malice aforethought, shot and killed Edwin R. Woodriffe, an officer of the FBI engaged in his official duties.

Second count, that on January 8, 1969, Defendant within the District of Columbia, purposely and with deliberate and premeditated malice, shot and killed Edwin R. Woodriffe.

Third count, that on January 8, 1969, within the District of Columbia, Defendant, wilfully and with premeditation and malice aforethought, shot and killed Anthony Palmisano, an officer of the FBI engaged in his official duties.

Fourth count, that on January 8, 1969, within the District of Columbia, Defendant purposely and with deliberate and premeditated malice, shot and killed Anthony Palmisano.

On March 5, 1969, after signature by the Grand Jury Foreman this indictment was filed in court as a true bill. The allegations

of each count are fully summarized above, and the indictment did not state for each count the citation of the statute defendant was alleged to have violated, as required by FRCrP Rule 7(c).

2. Change of venue and dismissal of counts.

On May 1, 1969, Defendant moved for a change of venue from the District of Columbia on the grounds that intensive publicity in the District of Columbia and nearby districts and statements to the press by agents of the FBI had inflamed public sentiment and created such prejudice against Defendant that he could not obtain a fair or impartial trial in the District of Columbia or nearby Districts.

On June 2, 1969, the U. S. Attorney responded to the motion for change of venue that, without conceding the validity of the allegations of the motion, the Government did not oppose a change of venue.

On June 6, 1969, the trial judge filed a document entitled "Memorandum", which stated, inter alia, that Defendant has "a substantial well-publicized criminal record, and the violent circumstances of the killings received wide and persistent attention in the local press and over radio and television." The Court stated that many members of a prospective jury panel might have some information about the case, and that "the case may have inflammatory aspects". The Court stated its view that "a fair trial is possible in this jurisdiction before a sequestered jury selected after a thorough voir dire", but added that the U. S. Attorney did not oppose the motion for a change of venue or present any facts to counter Defendant's proofs and assertions. The Court itself offered no facts

to counter Defendant's proofs and assertions. The Memorandum then stated: "Accordingly, defendant's motion for change of venue is granted."

The Memorandum granting the motion then went on to discuss the four counts of the indictment and concluded that: "The D. C. Code counts (2 and 4) are not transferable and must be dismissed."

On June 12, 1969, the U. S. Attorney filed "Government's Motion to Reinstate Counts Two and Four of Indictment." The Motion asked the Court to reinstate counts two and four of the indictment, stating as grounds that these counts are transferable for trial in a court of the United States for another district.

On June 13, 1969, the Court heard argument on the place to which the case was to be transferred and on the Government's motion to reinstate the two dismissed counts of the indictment.

Defendant asked the Court to transfer the case to Chicago, New York or Philadelphia, stating Defendant's personal preference to be in that order. The Government stated that Richmond, Virginia, which had been suggested by the Court, would be agreeable. Defendant clearly and strongly objected to Richmond. There was argument between the Court and defense counsel, which was concluded when the Court stated that "Richmond is the appropriate place, and I so ruled". (June 13th Tr. 27-35). The statement by the Court that "I so ruled" apparently refers to a sentence in the Court's June 6th memorandum stating that: "Subject to suggestion of counsel, it appears to the Court that Richmond, Virginia, may well be the appropriate jurisdiction."

Following this ruling there are 13 pages of argument by Government counsel urging the Court to reinstate Counts two and four of the indictment. (June 13th Tr. 36-49).

Defense counsel then asked the Court to hold in abeyance the selection of the jurisdiction to which the case should be transferred until Defendant could supply the court with data as to an appropriate jurisdiction. The Court refused this request. (June 13th Tr. 50-51).

The Clerk's minutes of the June 13th hearing recite that the case is to be sent to the U. S. District Court for the Eastern District of Virginia, Richmond, Virginia, and that the motion of the Government to reinstate counts two and four of the indictment is taken under advisement.

Defense counsel during the foregoing proceedings had been Theodore Christensen, Esq., and Leroy Nesbitt, Esq., both counsel appointed by the Court. Mr. Christensen was employed by the District of Columbia Legal Aid Agency; and after the case was ordered transferred to Richmond, Mr. Christensen filed a motion for leave to withdraw as court-appointed counsel, because of the limits of jurisdiction of his agency and the necessity for local counsel in Richmond. (June 27th Tr. 54). Thereupon Mr. Nesbitt conferred with Mr. Christensen and with Mr. Bryant, and filed a motion to withdraw the motion for change of venue. Mr. Nesbitt stated that the reason for this motion was that Mr. Christensen was most familiar with and most qualified to try the case, and that Defendant would get as fair a trial in the District of Columbia with Mr. Christensen as defense counsel as in Richmond without Mr. Christensen. (June 27th Tr. 54-55). The Court asked Mr. Nesbitt whether the withdrawal of the motion for change of

venue was "in any way influenced by the fact that the Court selected Richmond". Mr. Nesbitt responded that it was "in part". The Court then said, "I won't be put in that position Mr. Nesbitt". (June 27th Tr. 55). After several pages of colloquy, the Court leads Mr. Nesbitt to state that there is no reason to feel he cannot get a fair trial in this Court. (June 27th Tr. 58).

The Court thereupon stated: "The Defendant's motion to transfer is withdrawn. The Government's related motion with respect to Counts two and four of the indictment is declared moot; and Mr. Christensen's motion to withdraw is denied". (June 27th Tr. 59).

On October 17, 1969, a pretrial conference was held in this case. The U. S. Attorney stated that "the indictment as it presently stands raises some problems as to the manner in which a verdict on penalty would be elicited from the jury. . ." and that "the Government will elect to proceed on the Title 22 offenses", and that the "Title 18 offenses" will be dismissed. (Oct. 17th Tr. 5).

Thereupon the Court stated that without objection there would be an order at this time "dismissing the Title 18 offenses". (Oct. 17th Tr. 5-6). The Court then said that the appropriate way to proceed would be to "retype the indictment as a Title 22 indictment, only in two counts . . ." (Oct. 17th Tr. 6). Thereafter an "indictment" was typed, apparently in the judge's chambers, which set forth the second count of the indictment as signed by the Grand Jury Foreman as "FIRST COUNT" of this new document, and the fourth count of the indictment as signed by the Grand Jury Foreman as "SECOND COUNT" of the new document. This document typed in the

judge's chambers, in the form of a two-count indictment, is the document upon which the defendant went to trial in this case, which was submitted to the jury, and upon which the jury's verdict was returned. This document bore the typed name of the U. S. Attorney, and the typed name of the Foreman of the Grand Jury, in each case preceded by the notation "/s/". A copy of this document was filed with the clerk and is in the record stamped with the date of filing "Oct. 27, 1969".

3. The voir dire and trial.

On August 6, 1969, a pretrial conference was held to settle certain procedural matters. On August 7, 1969, the Court filed a "Pretrial Memorandum" in which the Court "directed" the procedure to be followed at the trial with respect to various matters, listed in numbered paragraphs. Insofar as relevant to this appeal, the Court directed as follows:

> "(3) The defendant may take the stand on the merits without any of his prior record being used to attack his credibility. His escapee status from Lorton, however, may be offered by the Government, subject to objections, as bearing on his intent. If the Government proposes to rely on any other prior acts as bearing on intent, it will advise the Court and defense counsel by September 2."
>
> "(7) The Court will conduct the voir dire and counsel will present suggested questions to the Court in writing by September 8. The jury will be sequestered throughout the trial . . . ."

On October 17, 1969, there was a final pretrial conference. At this pretrial conference the Court distributed to counsel a "memorandum opinion" of two pages on the subject of voir dire. (Oct. 17, Tr. 10). This memorandum had not previously been shown

to counsel. The Court stated that, in brief, the Court would conduct the voir dire and would not permit individual questioning of prospective jurors separate from the entire panel. (Oct. 17th, Tr. 10). Defense counsel noted that the Court put him at a disadvantage in asking for the right to question prospective jurors when the Court had already made a ruling on the subject. (Oct. 17th, Tr. 11). Nevertheless, Defendant sought to secure the right to question prospective jurors individually or separately (Oct. 17th, Tr. 11-16), but the Court indicated that it found Defendant's argument offensive (Oct. 17th, Tr. 15) and refused to amend the ruling.

The Court stated to the parties that the Court intended to conduct the voir dire by questioning the jury panel en masse, that the panel would consist of one hundred prospective jurors, and that the Court intended to select the jury in one day. (Oct. 17th, Tr. 41).

The Court concluded the final pretrial hearing with "one word of caution" to the Defendant personally, which was as follows:

> "In every matter that you have been before me to date so far, you have behaved entirely in a proper manner. I have no criticism of your demeanor of your conduct in any way. But I want you to understand that because of that I am not putting you under any restraints during this trial, as far as any handcuffs, leg irons or anything else. Now, on the other hand, if during the course of the trial you by word or acts interfere with the orderly conduct of the trial in any way, I am telling you now that you don't have a second chance." (Oct. 17th, Tr. 52.)

The trial began on October 20, 1969. At the beginning of the trial Defendant objected to the jury panel as having been contaminated by the comments of a judge in another case indicating that

judge's displeasure at the fact that the jury had not brought in a guilty verdict. (Tr. 2 et seq.) The Court stated that it would instruct the bailiff not to call on the panel in this case any of the 14 jurors who had been on the jury that had heard the improper comment of the other judge. Defense counsel objected that this would not wholly remove the contamination of the panel since the jurors mingled together in the room awaiting call must certainly be presumed to talk to one another. Defense counsel further indicated that this defect or contamination of the panel of prospective jurors would be compounded by the voir dire procedure of questioning en masse as ordered by the Court. (Tr. 4-5). The Court apparently took offense at this objection, and, despite the fact that the record indicates defense counsel had been respectful to the Court to the point of being deferential, the Court began the trial by warning defense counsel that: "Excessive objections, Mr. Nesbitt, in this case are not going to get us forward." (Tr. 5).

The Court conducted the voir dire examination of a panel of 100 prospective jurors en masse, starting about 10:00 a.m. on October 20th and concluding about 3:30 p.m., with an hour and a quarter lunch recess. (Tr. 17-197). The courtroom was filled with prospective jurors, leaving room only for counsel and members of the press, who had one pew of seats reserved throughout the trial. (Tr. 16). The courtroom had bad acoustics, making it difficult to hear. (Tr. 17, Tr. 76). Nevertheless, the method of examining the prospective jurors was simply by the statement of an inquiry by the Court

with any member of the 100 person panel seeking to respond required to rise, state his name, and ask for a microphone in order to make his response heard by others in the courtroom. (Tr. 18). A number of prospective jurors were excused for cause because of illness or personal inconvenience, and additional prospective jurors were called.

After the Court began questioning the group en masse regarding their knowledge of the case from the media, defense counsel again noted an objection to the procedure being followed, stating to the Court: "I am having a great deal of difficulty of being satisfied that the parties who have failed to respond have failed to respond because they feel in evaluating what they know about the case that it isn't sufficient to meet the court standard of detailed information. I don't know how to get around it, but I believe the fact that a large group of people did stand initially and only five came forward when the Court asked about detail leaves a great deal of question in my mind as to whether the --" Counsel was cut off by the Court at this point and the Court refused to change the voir dire procedure. (Tr. 129-130).

The trial of the case began on October 21, 1969 and the presentation of testimony and evidence was completed at about 11:00 a.m. on October 25, 1969.

Agent Sullivan of the FBI was a witness for the Government. (Tr. 292-354). He testified that on January 8, 1969, in company with Agent Edwin R. Woodriffe and Agent Anthony Palmisano, he went to 133 Yuma Street, S. E., Washington, D. C., to interview the wife of a

suspect in a bank robbery that had occurred shortly before in Prince George's County. The testimony made clear that the woman to be interviewed as the wife of the suspect in the bank robbery was Mrs. Bryant, the wife of Defendant. Agent Sullivan testified that he located the apartment of Defendant and one of the agents (the testimony is not clear as to which one) knocked on the door. The door was opened halfway, and Agent Woodriffe asked if Mrs. Bryant was at home. The man behind the door said she was not. Agent Woodriffe then asked the man his name and the man replied "Freeman". Agent Woodriffe then said they were from the FBI and wanted to come in and talk to the man for a minute. The man replied the lady of the house was not in and he could not invite anybody in. Agent Woodriffe said they would like to come and talk for a minute, and at this point the man behind the door began firing a gun and hit Agent Woodriffe and Agent Palmisano. Agent Sullivan identified the man behind the door as Defendant. His testimony indicated that the entire conversation and actions immediately preceding the shooting took about 25 seconds. (Tr. 352-353).

Defendant testified in his own behalf. (Tr. 492-555). Defendant testified that he was in the apartment at 133 Yuma Street alone on January 8, 1969, when he heard a knock on the door. He went to the door and opened it halfway and saw three men standing there. One of them asked if Mrs. Bryant was home and Defendant said she was not. The man then asked Defendant his name and Defendant testified "I gave him my alias name". About this time one of the

other men said, "You are Billie Bryant, aren't you?" Defendant said "No". At this time defendant saw one of the men reaching for his gun and heard him say "We are from the FBI". About this time one of the other men "knocked the door in on" Defendant and told him not to try anything. Defendant testified that at this time he "heard a gunshot go off" and he spun around and shot the man that was closest to him and then shot the man "that was firing at me".

Much of the testimony concerned Defendant's mental condition. There was testimony that Defendant was suffering from a mental disorder at the time of the shooting (Tr. 616), and that this disorder could be characterized as an anti-social personality with paranoid traits. (Tr. 620). There was also testimony that at the time involved here Defendant was suffering from a sociopathic personality with paranoid features (Tr. 777), that Defendant had little control over himself and that his impulses took over completely at the time of the shooting. (Tr. 782-783).

4. Instructions to the jury and verdict.

On October 27, 1969, there was final argument and instructions to the jury. (Tr. 1026-1134). Defendant requested an instruction that if the jury found Defendant was not insane,

> "yet if the jury find from the evidence that there was such a degree of mental unsoundness existing at the time of the homicide as to render the defendant incapable of premeditation and of forming such an intent as the jury believe the circumstances of this case would reasonably impute to a man of sound mind, they may consider such degree of mental unsoundness in determining the question whether the act was first degree murder or second degree murder."

This instruction was denied. (Tr. 1027.)

The jury retired to deliberate at 5:50 p.m. on October 27th and returned to Court with a verdict at 10:06 p.m. (Tr. 1134-1135). The verdict of the jury was guilty of murder in the first degree under "Count One" of "the indictment" and under "Count Two" of "the indictment", the indictment being the document typed in the judge's chambers and stating what had been the Second and Fourth counts of the indictment signed by the Grand Jury Foreman.

On October 28, 1969,the jury was convened to consider whether the sentence should be death or life imprisonment. The jury was unable to agree. On November 3, 1969, the Defendant came before the Court for sentencing and, according to the recital in the Judgment and Commitment filed herein on that date was sentenced to imprisonment for a period of

> "life on Count 2 and life on Count 4, said sentences to run consecutively. . . ."

Notice of Appeal herein was filed on November 3, 1969.

ARGUMENT

I. BRYANT'S CONVICTION MUST BE REVERSED BECAUSE THE DISTRICT COURT TRIED THE CASE IN A DISTRICT SATURATED WITH PUBLICITY PREJUDICIAL TO THE DEFENDANT AFTER THE COURT HAD GRANTED A MOTION FOR CHANGE OF VENUE.

A. IT WAS REVERSIBLE ERROR TO MAKE THE TRANSFER OF THE CASE CONTINGENT ON DEFENDANT'S RELINQUISHMENT OF HIS RIGHT TO EFFECTIVE COUNSEL UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION.

B. IT WAS REVERSIBLE ERROR FOR THE DISTRICT COURT TO MAKE TRANSFER OF THE CASE CONTINGENT ON ACCEPTANCE OF RICHMOND, VIRGINIA, AS THE VENUE FOR THE TRIAL.

Unquestionably, the present case was widely publicized in the District of Columbia, with much emphasis on the occupation of the

deceased and the violent nature of the occurrence. In an area where there is a substantial number of Federal Government employees, the killing of two Federal Bureau of Investigation agents becomes a cause celebre. In Defendant's motion for change of venue and transfer from the District of Columbia for trial, attorneys for the Defendant noted, "Local sentiment has been inflamed by comments to the press of agents of the Federal Bureau of Investigation". Although not conceding the validity of this allegation, the Government expressed no opposition to the change of venue. At least one group of Federal employees attempted to use the case in their own labor management disputes. (Pretrial, October 17, 1969, Tr. 36; Trial, Tr. 5). The publicity given the case was particularly inflammatory in view of the extensive District of Columbia anti-crime program which was a political issue, and to which the Government had committed itself. Under the conditions of such inflammatory and prejudicial publicity, it is not surprising that the Government did not contest the Defendant's motion for change of venue. The District Court explicitly recognized the factors when, granting the motion for a change of venue, the Court said:

> [Defendant] . . . has a substantial well-publicized criminal record, and the violent circumstances of the killings received wide and persistent attention in the local press and over radio and television. It is reasonable to suppose that many members of the prospective jury panel will have had some information about the case, that the trial will be widely covered by all communication media, and that the issues may be viewed by the jury in the context of the vigorous local anti-crime campaign. (Memorandum, opinion and ruling, June 6, 1969, p. 1.)

Under the circumstances outlined, there is no question that under the due process clause of the Fifth Amendment to the Constitution and the impartial jury clause of the Sixth Amendment Defendant was entitled to a change of venue to remove the trial from the community which had been saturated with publicity adverse to him, Rideau v. Louisiana, 373 U.S. 723 (1963), to a locale where the Defendant might be tried in an atmosphere of "judicial serenity and calm," Estes v. Texas, 381 U.S. 532, 536 (1965), where even the probability of unfairness would be avoided, Sheppard v. Maxwell, 384 U.S. 333 (1966). Other cases which indicate the types of situations in which motions for a change of venue on the basis of prejudicial publicity must be granted are United States, ex rel Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963); Juelich v. United States, 214 F.2d 950 (5th Cir. 1954); United States v. Rossiter, 25 F.R.D. 258 (D. Puerto Rico 1960); and United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952).

It should be emphasized that while Rule 21 of the Federal Rules of Criminal Procedure provides the procedure for handling a motion for a change of venue, the Defendant has a constitutionally guaranteed right under the due process clause of the Fifth Amendment, and the trial by an impartial jury clause of the Sixth Amendment to a change of venue. In United States v. Marcello, 280 F. Supp. 510 (E.D. La. 1968), the defendant was granted a change of venue and later filed a "motion to reconsider order directing change of venue". In that case, the Court denied that motion after rejecting an argument that the case could be transferred only where it was shown that the

Constitutional rights of the defendant would be violated by trial in the district of indictment. In so doing, the Court made clear the relationship between the Constitution and the discretion of the trial judge:

> . . . it could hardly be suggested that the vital constitutional right to a fair and impartial trial hinges upon the discretion of the trial judge. (At 513).

After the motion for change of venue was granted, the Bryant case proceeded for some three (3) weeks on the basis that a decision had been made to transfer the case to another venue. In fact, an argument which occupies some eight (8) pages of the transcript takes place on this basis (June 13, 1969, Tr. 26-52). There is no question that the decision was final. At the hearing on June 13, 1969, the Court stated:

> As far as anything else [other than a mental examination which had already begun at St. Elizabeth's Hospital] is concerned, the case can go there tomorrow. (June 13, 1969, Tr. 51).

The Constitutionally required change of venue would have occurred had not (1) the statute under which co-counsel Christensen was employed by the D. C. Legal Aid Agency and local Court rules required that he be replaced by local counsel at the new venue (June 27, 1969, Tr. 54); and (2) the change of venue then made contingent on the transfer to Richmond (see argument infra). The record shows that chief counsel, Leroy Nesbitt, considered Mr. Christensen's services "invaluable to a defense." (June 27, 1969, Tr. 54). The

Defendant apparently concurred in this view (ibid.), and the record fully reflects the irreplaceable value of the co-counsel, Mr. Christensen, who had been with the case longer than Mr. Nesbitt (ibid.; June 13, 1969, Tr. 50), and throughout the case took a lead in preparing and presenting the Defendant's insanity defense. (Affidavit filed June 25, 1969; Tr. 608-650).

It is clear that the Defendant is entitled to "the guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69 (1932). It is also clear that "assistance of counsel" means effective assistance of counsel. United States v. Warden, United States Penitentiary at Leavenworth, 216 F. Supp. 609 (D. Kan. 1963). In the present case, effective assistance of counsel was obtained only at the price of giving up the Constitutionally required change of venue. The defendant should not have been placed in a position which made such a choice necessary. Insofar as any statutory limitations deprived Defendant of effective counsel, they were unenforceable, and the Court should have taken any steps necessary to provide Defendant a venue where he might receive due process of law, a jury drawn from a district where the jurors were not likely to have had their attitude affected by publicity prejudicial to the Defendant, and effective assistance of counsel.

It is also apparent from the Record that the District Court, after granting a change of venue, later attempted to make the change conditional on the acceptance by the Defendant of Richmond, Virginia, as the new venue. (June 13, 1969, Tr. 27-37). This was Constitutionally

impermissible. Not only does defendant have a Constitutional right to a change of venue and effective counsel he also has a right under the Sixth Amendment to a trial by jury "of the state and district wherein the crime shall have been committed". In United States v. Parr, 17 F.R.D. 512 (S.D. Tex. 1955)[1/], it was held that a waiver of the Sixth Amendment right to trial by a jury of the state and district wherein the crime shall have been committed must be had in order for there to be a transfer. In that case, the defendant requested and consented to a transfer only to a certain district. The District Court held that it had no power to transfer the case to a venue other than that as to which Defendant had waived his Sixth Amendment right. Although United States v. Parr, supra, arose under a transfer pursuant to Rule 19 of the Federal Rules of Criminal Procedure, a Constitutional right as to the place of transfer is not controlled by the Federal Rules of Criminal Procedure, and is available in proceedings under Rule 21(a) as it is in proceedings under Rule 19.

In the present case, Defendant was entitled to a change of venue under the Fifth and Sixth Amendments, as argued above. It is submitted that the Defendant also had a Constitutional right under the Sixth Amendment, which could be conditionally waived, as to the trial in the state and district wherein the crime shall have been committed. Further, it is submitted the Defendant in effect waived this Constitutional privilege only insofar as it would make possible the transfer of the case to a venue where he might probably receive

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1/ For further proceeding in this case note relevant to the holding in 17 F.R.D. 512, see 225 F.2d 329 (5th Cir. 1956), 351 U.S. 513 (1956) Reh. den. 352 U.S. 513 (1956).

a trial free of the bias and prejudice which had been aroused in the Washington area by widespread publicity. Chicago, New York, and Philadelphia were such venues. Richmond, in the opinion of the Black Muslim Defendant (Tr. 489), was not, and the District Court had no authority to attempt to condition Defendant's exercise of his Constitutional right to a change of venue on the Defendant's acceptance of Richmond as a proper venue for the transfer.

In the present case, the Court not only allowed the trial to take place in the very seat of publicity hostile to the Defendant, but also refused Defendant's request to issue orders regulating the activities of the news media during and immediately prior to the beginning of the trial. The Court's response to the request was:

> I will not do that and I told you I wouldn't do it. We have a free press in this country. (October 17, 1969, Tr. 37-38).

In fact, the Court went so far as to reserve a pew for the press at the trial and at the voir dire examination. These seats were reserved even to the exclusion of the general public at the voir dire (Tr. 16), and the press was allowed to enter and leave the courtroom without restraint (Tr. 1035).

Thus, Defendant was not only deprived of his Constitutional right to a change of venue, but also did not receive from the Court the kinds of protection which would have ordinarily produced an atmosphere of judicial serenity and calm in the District of Columbia proceedings.

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Thus, Defendant was not only deprived of his Constitutional right to a change of venue, but also did not receive from the Court the kinds of protection which would have ordinarily produced an atmosphere of judicial serenity and calm in the District of Columbia proceedings.

II. BRYANT'S CONVICTION MUST BE REVERSED BECAUSE THE DISTRICT COURT DENIED HIM THE RIGHT TO INTERROGATE PROSPECTIVE JURORS INDIVIDUALLY ON VOIR DIRE.

As stated in the facts and arguments above, the events and proceedings in this case were the subject of massive publicity unfavorable to the Defendant. In view of the failure to transfer the trial to another venue and failure to place any restrictions on press coverage of the events, it became all the more important that the voir dire be conducted in a manner calculated to preserve the Constitutional rights of the Defendant. This was not done.

Counsel was informed by the Court, in a pretrial memo dated August 7, 1969, that the Court intended to conduct the voir dire. The Court announced its final decision in a subsequent memorandum of October 17, 1969. Counsel was then put in the awkward position, at the first oral hearing on the matter, of arguing for individual examination of prospective jurors after the Court had made a ruling. (October 17, Tr. 11).

As was explicitly pointed out by counsel for the Defendant, a difficulty with the method of voir dire which the Court adopted was that the questioning of jurors in the presence of other jurors would promote a situation in which the entire panel might be influenced by the behavior or answer of others in the group. (October 17, Tr. 12).

In Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), there was involved a notorious case in which the Government

charged misapplication of bank funds in the making of false entries in bank records. Although in that case there was considerable news media publicity, the situation obviously lacked the violent and sensational aspects of the instant case. Thus, the principles stated therein would appear to be applicable a fortiori here. In Silverthorne, supra, the Court conducted the voir dire examination. In commenting on the sufficiency of the general voir dire, the Court of Appeals said:

> Because of the voluminous publicity antedating appellant's trial, some of which was prejudicial in nature, and in view of the trial court's denial that any prejudice existed because of the pretrial publicity, the court's voir dire examination should have been directed to the individual jurors. In light of this publicity, we would prefer (emphasis in original) to apply the rule that prevails when prejudical matter is brought to the jury's attention during the course of the trial:
>
> "* * * [T]he court should * * * [make] a careful, individual examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the articles." (At p. 639).

The Silverthorne Court said further:

> As to those jurors who offered no responses to the court's questions, we agree with the conclusions of the court in Henslee v. United States, 246 F.2d 190 (5th Cir. 1957), that the fact that they did not respond to the court's general inquiries does not establish that the publicity "could not have prejudiced any member of the jury". (At p. 640).

Counsel for the defense in Silverthorne requested permission of the Court to examine the jurors individually. The Court denied this request. In this regard, the Court of Appeals held:

> In so ruling, the court, under the peculiar and difficult facts of this case, abused its discretion to the prejudice of the appellant. At the time appellant's motion was directed to the court, the examination had been concluded as to four of the jurors who were ultimately selected, two of whom were never questioned individually by the court. (Emphasis in original.) (At p. 640.)

In the present case, only one of the jurors finally chosen had been subject to individual examination on the matter of prejudicial publicity, Sara L. Goins (Tr. 131). Only seven (7) members of the panel chosen had made oral responses of any kind during the voir dire, [2] and five (5) made no response of any kind. [3] One can only speculate as to how many of the panel in the crowded courtroom with poor acoustics (Tr. 17, 76), might have had the hearing problems of prospective juror Laura Barfield (Tr. 196, 197) and never even heard the questions by the Court.

In the memorandum of points and authorities in support of Defendant's request for individual examination of prospective jurors, counsel for the defense quoted from the American Bar Association Project on Minimum Standards for Criminal Justice as follows:

> Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror

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2/ Louis Berrard (Tr. 164), Frank J. Kavanaugh (Tr. 180, 182), Lollie B. Stuart (Tr. 184), Charles G. Bogan (Tr. 176, 186), Sara L. Goins (Tr. 131), Salvatore S. Furnari (Tr. 165), and Ruth J. Miller (Tr. 185).

3/ Kenneth G. Hunt, Herman H. Rawley, Jr., Elizabeth C. Alexander, and Charles B. Daniel and Ann T. Taltavull. Jurors are listed at Tr. 1137-1138.

> with respect to his exposure shall take place outside the presence of other chosen and prospective jurors . . . . (American Bar Association Project on Minimum Standards for Criminal Justice, "Standards Relating to Fair Trial and Free Press", §3.4(a), p. 130 (March, 1968).

The United States District Court Judge in his voir dire opinion and ruling of October 17, 1969 dismissed this standard by saying:

> "The ABA-recommended standards do not have the thrust defendant's cited excerpt suggests." (Voir Dire, opinion and ruling, October 17, 1969, p. 2).

The commentary to §3.4(a) makes it clear that the thrust of the standard was as stated by the counsel for the defense. See "Fair Trial and Free Press," p. 135.

In United States v. Ridley, 134 U.S. App. D.C. 79 , 412 F.2d 1126 (D.C. Cir. 1969), a case involving a situation much less serious than two counts of first degree murder, i.e., unauthorized use of a motor vehicle, this Court did in fact suggest that the District Courts explore new ways of conducting the voir dire examination. It is submitted, however, that this authorization does not in any way justify the use of the en masse method of voir dire employed in the present case, and the case actually is an indication that the District Courts, especially in capital cases, should seek ways different from the en masse approach to voir dire customarily employed in our District Courts.

Patriarca v. United States, 402 F.2d 314 (1st Cir. 1968), concerned appeals from judgments of convictions following jury

verdicts against defendants on counts of conspiracy to travel and use the telephone in interstate commerce with intent both to commit murder to further an unlawful gambling enterprise and to promote such enterprise, and thereafter to attempt to commit such murder and acts of promotion.

During the pretrial period, there was considerable publicity concerning the "Mafia" and "Cosa Nostra", although much of it was not explicitly connected with the defendants on trial. Because of this lack of connection, motions for continuance and change of venue were denied by the District Court and this decision was upheld on appeal. The Appellate Court did say, however:

> Following the denial of the motions for continuance and change of venue, there was another opportunity for counsel to mitigate any possible effect of pretrial publicity -- on the voir dire. Counsel for one of the appellants requested that the court "ask a question of the jury in connection with this case, in the light of all the publicity." The court replied that it would "put to them a general question and ask them if there is any member of the jury here who feels that he would not be able to give the defendants a fair and impartial trial." Counsel said, "Fine, thank you, your Honor." The question was put. No response was forthcoming. The court stated that it assumed that all were "in agreement on this particular question." The jurors were then sworn and thereafter sequestered.
>
> While the court did all that was requested at this juncture, and cannot under the circumstances of this case be charged with error in not inquiring further, sua sponte, we feel bound to concede that such a single question posed to the panel en bloc, with an absence of response, achieves little or nothing by way of identifying, weighing, or removing any prejudice from prior publicity. In cases where there is, in the opinion of the court, a significant possibility that jurors have been exposed to potentially prejudicial material, and on request of counsel,

> we think that the court should proceed to examine each prospective juror apart from other jurors and prospective jurors, with a view to eliciting the kind and degree of his exposure to the case or the parties, the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence. (At p. 317-318.)

Many commentators and Courts have questioned whether voir dire conducted in even the most careful manner may be sufficient to discern and eliminate the effects of prejudicial publicity. In summarizing the commentary and authority on this point the Court in United States v. Marcello, supra, said:

> Further, the efficacy of depending upon the voir dire to determine whether substantial prejudice exists has recently been seriously questioned. Comment, Fair Trial v. Fair Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to Be Impartial; a Plea for Reform, 38 So. Cal. L. Rev. 672 (1965). Indeed, as the court stated in Delaney v. United States, 199 F.2d 107 (1st Cir. 1952):
>
> > "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity." at 112-113.

Realizing this danger, the Supreme Court has recognized that when the pre-trial publicity is great, the court may disregard prospective jurors' assurances of impartiality. Irvin v. Dowd, . . .; Sheppard v. Maxwell, supra; 8 Moore, Federal Practice, p. 58 (1967 Cum. Supp.); see also, Broeder, Voir Dire Examinations: An Empirical Study, 38 So. Cal. L. Rev. 503 (1965). It is therefore quite proper, if not indeed required in some instances, to make the determination, as we have done, solely on the basis of the

> pre-trial publicity which has undoubtedly, as here, created a dominant sentiment of prejudice in the community. Note, The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury, 42 Notre Dame Lawyer 925, 933-937 (1967). (At pp. 514-515).

These doubts about the efficacy of the voir dire lend even more weight to the contention that to deny Defendant the right to interrogate prospective jurors individually and rely on en masse voir dire by the Court was reversible error.

III. BRYANT'S CONVICTION MUST BE REVERSED BECAUSE HE WAS TRIED ON AN INDICTMENT AFTER THE DISTRICT COURT HAD DISMISSED ALL THE COUNTS IN THE INDICTMENT.

The Fifth Amendment to the Constitution of the United States provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury; . . . nor be deprived of life,liberty or property without due process of law.

It is axiomatic that since a Court has no power to indict, a dismissal of an indictment arrests the power of the Court to proceed against a citizen until the Grand Jury reindicts the citizen. This is made clear in the leading case on the effect of amending an indictment, Ex Parte Bain, 121 U.S. 1 (1887). In that case, an indictment was amended by striking certain language. The defendant was tried and convicted, and subsequently applied for a writ of habeas corpus. The Supreme Court had no difficulty in holding that the change in the indictment deprived the Court of the power to try the petitioner and sentence him to imprisonment. In so doing, the Court said:

> It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be "held to answer," he is then entitled to be discharged so far as the offence originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle presequi had been entered. (At p. 13.)

More recently the Supreme Court in Stirone v. United States, 361 U.S. 212 (1960), made it clear that the Constitutional right to be tried only on a Grand Jury indictment properly drawn and used was not to be treated casually lest the right "be frittered away until its value is almost destroyed." Bain, supra, at p. 10. In Stirone, the indictment had charged unlawful interference with interstate commerce in violation of the Hobbs Act (18 U.S.C. §1851) by interference with materials moving from outside the State of Pennsylvania into the State of Pennsylvania. Over defendant's objection, the Court allowed testimony on interference with goods moving from within the State of Pennsylvania to outside the State of Pennsylvania. On appeal from a conviction, the Court of Appeals upheld the conviction. The Supreme Court reversed and, in so doing, rejected the Government's contention that all that was involved was a mere variance between the indictment and the evidence. The Court said:

> While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges

> presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. (At p. 217.)

This Court of Appeals has recently shown in Gaither v. United States, 134 U.S. App. D.C. 154, 413 F.2d 1061 (D.C. Cir. 1969), its concern for the orderly use of a criminal indictment by the District Court. It fully recognized that the Fifth Amendment's guarantee that prosecution for serious crimes may only be instituted by indictment was a procedural safeguard designed to secure the accused of a fair trial. Gaither involved a comparatively minor criminal offense in which clothing with a wholesale value of approximately $131.00 was stolen. The Court there disapproved the procedure whereby the Grand Jury made a presentment after which the United States Attorney's Office drafted an indictment which was merely signed by the foreman of the jury without subsequent action of the Grand Jury acting as a body.

The procedure disapproved in Gaither was apparently followed in the present case. An exceedingly spare presentment was translated into four (4) counts of an indictment not in conformation with Rule 7(c) of the Federal Rules of Criminal Procedure. After signature by the Grand Jury Foreman, the document was filed in Court as a true bill. See Statement of Facts, supra, p. 1.

On June 6, 1969, the District Court Judge dismissed counts two and four of the indictment. It is apparent from the document of June 6, 1969, entitled "Memorandum" that the action of the Court

dismissed counts two and four and that the District Court in fact intended this dismissal. Certainly the Government so understood this statement from the Court, and in fact on June 12, 1969, the United States Attorney filed "Government's Motion to Reinstate Counts Two and Four of the Indictment", and on June 13, 1969, there were thirteen (13) pages of argument by Government counsel urging the Court to reinstate counts two and four of the indictment (June 13, 1969, Tr. 36-49).

The District Court's practice in dismissing the counts by means of a memorandum opinion is consonant with its later practice in regard to its rulings (1) on the venue to which the case would be transferred; and (2) on the conduct of the voir dire. As to the proper venue for transfer, the Court on June 13, 1969 heard argument on the place to which the case was to be transferred. At the conclusion of the argument the Court said: "Richmond is the appropriate place, and I so ruled" apparently refers to a sentence in the Court's June 6, 1969 memorandum stating that: "Subject to suggestion of counsel, it appears to the Court that Richmond, Virginia, may well be the appropriate jurisdiction." Thus, the Court apparently intended its choice of Richmond, Virginia in the June 6, 1969 memorandum to be a ruling on the matter.

As to the voir dire, the Court distributed a memorandum, and when counsel for Defendant inquired "I take it the paper the Court handed to the counsel is a ruling or an opinion?", the Court answered, "It is an opinion and a ruling." (October 17, 1969, Tr. 10-11).

Although the matter apparently has not been extensively discussed by the Courts, there is authority to the effect that the memorandum of the Court operates as an order when it is intended as a final ruling. In State v. Lamping, 36 Wis. 2d 328, 153 N.W. 2d 23 (1967), it was said that a final ruling of Court, even if incorporated in a memorandum decision, constitutes an "order", although it is preferable for trial courts to draft and enter a separate order. To the same effect is In Re Baumgarten's Estate, 12 Wis. 2d 212, 107 N.W. 2d 169 (1961). In Feenaughty Machinery Co. v. Turner, 33 Idaho 363, 257 P. 38, (1927), it was held that a memorandum decision of the trial court on hearing a motion to retax costs constituted "an order" sufficient to authorize appeal therefrom. In Allen v. Voje. 114 Wis. 1, 89 N.W. 924 (1902) it was said:

> An "order" or judgment is the decision of the Court. It may be formulated in writing by the judge or declared by him orally.

In the present case, even if it were conceded arguendo that the Court might reinstate the dismissed indictment, there was in fact no reinstatement of the indictment. After the motion for change of venue had been granted and then erroneously withdrawn, the Court merely declared the Government's motion for reinstatement of Counts two and four of the indictment as moot. (June 27, 1969, Tr. 59.) At the pre-trial conference on October 17, 1969, the Court dismissed Counts one and three of the indictment. (October 17, 1969, Tr. 5).

Even if this Court should find that a dismissed indictment might be reinstated, the fact remains that in this case there was

no reinstatement as to Counts two and four of the indictment, and Counts one and three were dismissed at a later time. Thus the District Court had dismissed all the counts in the indictment and there was not a valid Grand Jury indictment before the Court.

In the Gaither case, supra, the concern of this Court appears to have been with the possibility that the indictment prepared by the United States Attorney would be at variance with the indictment found by at least twelve (12) of the Grand Jurors. In the Bryant case, that possibility was evidently not foreclosed. In addition, the Bryant case proceeded for some three (3) weeks on the presumption that Counts two and four, which entailed material differences from and in fact contradicted the procedure under Counts one and three for determining whether or not the Defendant would receive life or death, had been dismissed. Those counts were never reinstated by a Grand Jury or otherwise. Counts one and three were later dismissed and never reinstated. Still later, Counts two and four were recast into a new and different indictment with two counts numbered one and two. Although the new indictment bore the typed name of the United States Attorney and the typed name of the foreman of the Grand Jury, in each case preceded by the notation "/s/", it apparently never actually was signed by either the United States Attorney or the foreman of the Grand Jury. It is this document upon which the Defendant went to trial in this case, which was submitted to the jury and upon which the jury's verdict was returned.

However, it is evidently not the document upon which the judgment and commitment of the Defendant was entered, since the Judgment and Commitment filed by the Court on November 3, 1969 refers to Counts two and four of an indictment. It follows that the Defendant was tried and convicted without a proper Grand Jury indictment and without due process of law.

IV. BRYANT'S CONVICTION MUST BE REVERSED BECAUSE THE COURT DREW A JURY FROM A GROUP OF JURORS WHICH HAD BEEN MISLED, OR CONTAMINATED, BY THE PREJUDICIAL REMARK OF ANOTHER JUDGE.

A United States District Court Judge, other than the Judge in the instant case, remarked to the jury following their return of a not guilty verdict:

> Ladies and gentlemen you can go back to the jury lounge and await further assignment. I hope you will do better next time. (Tr. 2).

These jurors then returned to the lounge to mix and presumably talk with a group of prospective jurors from which the Bryant jury was chosen. The Court stated that the difficulty with contamination of the jurors could be resolved by eliminating the twelve (12) jurors to whom the improper remarks had been made. The Court denied defense counsel's request to strike the entire panel constituted for the month or to substitute a panel from another courthouse (Tr. 3), although he did strike, in addition to the twelve (12) jurors, two (2) alternates. The Court said that any residual problems could be resolved by the voir dire (Tr. 3). At voir dire, a general question was asked as a second part of the sixth question in a series of seven (7) general questions. The question asked was:

> Is there any among you who for any reason whatsoever has any reason to believe that as jurors you are to lean in favor of the Government or that any judge of this Court or any official would in any way criticize you or suggest you would not be doing your duty if you were to return a verdict of not guilty in this case? (Tr. 189-190).

There was no response to this question, or indeed to any of the questions in that series. The language quoted supra from the Patriarca case as to the ineffectiveness of an en bloc question which elicits no response is particularly applicable here. It was apparently conceded by the District Court Judge that the problem with pollution by the remarks of another judge could not be dispensed with merely by dismissing the twelve (12) jurors and the two (2) alternates for the panel to whom the remarks were made directly. It is submitted that the method chosen for dealing with the residual problem was clearly inadequate. A general question which elicited no response, as did all the questions in this series, provided no indication of whether or not there was prejudice in the minds of the jurors as a result of the improper remark, and did not protect the Defendant from this pollution.

V. BRYANT'S CONVICTION MUST BE REVERSED BECAUSE THE COURT PERMITTED THE EVIDENCE OF PRIOR CRIMES TO BE GIVEN TO THE JURY.

Although generally evidence of behavior occurring prior to the crime with which Defendant is charged may be admissible to show the motive or intent of the Defendant in committing the alleged crime, this exception to the rule against admissibility of prior

crimes is itself subject to an exception -- that "the trial judge is required, as with any potentially prejudicial evidence, to balance all of the relevant factors to determine whether the probative value of the evidence of other crimes is outweighed by its prejudicial character". United States v. Deaton, 381 F.2d 114, 117 (2nd Cir. 1967). See 1 Wigmore, Evidence (3rd Ed.), §29(a) at 412; McCormick, Evidence (1954) §152 at 319-321. The ALI Model Code of Evidence, Rule 303, provides that:

> (1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will . . . (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury . . . ."

In the present case the District Court recognized the possibility of prejudice and difficulty regarding evidence of prior acts when the Court ordered in its Pretrial Memorandum of August 7, 1969, that Government counsel must notify the Court and defense counsel if the Government was going to offer or rely on any prior acts other than Defendant's escape. Although Government counsel filed a notice on September 2, 1969, saying it proposed to rely on prior acts other than Defendant's escape to show intent, it is submitted that this notice was not adequate and was not in conformity with the purpose of the Court's order, since the Government notice did not specify the prior acts to be relied upon, and thus did not provide defense counsel with any notice that the Government would introduce evidence suggesting the commission of a prior bank robbery by Defendant, for which Defendant had not been convicted, indicted, or formally accused.

The Second Circuit Court of Appeals has held that in cases when the probative value of evidence proferred to show motive, intent or the like is slight, while the prejudicial character may be very strong, "the trial judge has a duty in the exercise of his discretion, to exclude it". U. S. v. Knohl, 379 F.2d 427, 438-39 (2nd Cir. 1967). See also U. S. v. Palumbo, 401 F.2d 270, 273 (2nd Cir. 1968); U. S. v. Krulewitch, 145 F.2d 76, 80 (2nd Cir. 1944). This principle is also firmly established in the District of Columbia cases. Awkard v. U. S., 122 U.S. App. D.C. 165, 352 F.2d 641, 643 (D.C. Cir. 1965); Brown v. U. S., 125 U. S. App. D.C. 220, 370 F.2d 242, 244-45 (D.C. Cir. 1966); Luck v. U. S., 121 U.S. App. D.C. 151, 348 F.2d 763, 768 (D.C. Cir. 1965); Harper v. U. S., 99 U.S. App. D.C. 324, 239 F.2d 945, 946 (D.C. Cir. 1956). Such a balancing test is especially appropriate in this area, since the potentiality for prejudicially inflaming the minds of the jurors against the Defendant as being a "bad man", who should be punished, is very great. See "Comment, Procedural Protections of the Criminal Defendant -- A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime," 78 Harv. L. R. 426 439-40 (1964); Note, "Other Crimes Evidence at Trial: Of Balancing and Other Matters", 70 Yale L. J. 763 (1961); 1 Wharton's Criminal Evidence §232, at 497-98 (12th Ed.); People v. Emmel, 292 Ill. 477, 127 N.E. 53, 57 (1920). In applying such a test, "the problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes-evidence in the light of the issues and the other evidence available to the prosecution, the convincingness

of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes-evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility." McCormick, Evidence § 157, at 332 (1954).

It is submitted that this is an appropriate case for the application of the rule of exclusion with respect to the testimony of the witnesses Mosley and Hilferty, and that the admission of their testimony was error. The Government had fully and adequately established motive or intent by establishing the fact that Defendant had escaped from Lorton, from which fact it was obvious that Defendant desired to avoid apprehension. When the Government added the testimony of two witnesses that Defendant had robbed the bank in which they were tellers, nothing was added to the inference that Defendant sought to avoid apprehension, but an entirely new issue was injected into the case, and the testimony almost certainly had a prejudicial effect on the jury, indicating that Defendant was a "bad man", deserving of punishment and inclined to the commission of crime. At best, the utility of such evidence to the Government was minimal. It was no more than uncorroborated testimony of an occurrence which Defendant denied having had any part in, and which, at that time, had not been established as a crime, much less one of which defendant was guilty. In the circumstances of the trial below, the testimony was obviously intended to indicate to the jury that Defendant was a bank robber, and thus was highly prejudicial and not very relevant to the case on trial.

Dean Wigmore has said that: "if certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent . . . there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose". 6 Wigmore, Evidence, §1864, at p. 491 (3rd Ed. 1940). The testimony of the witnesses referred to above was not indispensable for any legitimate purpose. On the contrary, the situation as to intent was well established, and the testimony as to the bank robbery added nothing of significance except to put the Defendant in a bad light in the view of the jury.

Particularly instructive here is the case of U. S. v. Byrd, 352 F.2d 570 (2nd Cir. 1965) where, in remanding the case to the trial court the Second Circuit commented upon the admission of certain evidence objected to by the defendant, for the purpose of guiding the lower court in the disposition of the issue. The witness had testified as to transactions with defendant, an IRS employee, in which the witness had paid certain sums to the defendant for auditing specified tax returns, which were the subject of an indictment returned against the defendant charging illegal receipt of a fee by a Government employee. The witness had further testified to the payment of another fee, in connection with a separate return not a part of the offense charged, for the purpose of showing intent. As to this the Court of Appeals said, "its probative value was largely cumulative. . . . If the jury believed his testimony as to (the transactions involved in the indictment), the relating of the Sandberg incident added little, if anything, to a revelation of Byrd's state of

mind." 352 F.2d at 574-75. The Court further pointed out that, "[w]here the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it, is slight, its admission at that stage may be held to be an abuse of discretion." 352 F.2d at 575. It is submitted that the application of these principles to the instant case would have required a ruling that the proferred testimony of witnesses Mosley and Hilferty was inadmissible, the contribution to the Government's proof being small if any while the potential for prejudice was great.

Moreover, in the present case the testimony of other crimes was brought in by witnesses who had no other purpose and was not, as is Byrd, simply additional testimony by witnesses otherwise essential to the case-in-chief. This put Defendant and his counsel in an inescapable dilemna. In order to refute the testimony and implication of commission of another crime, which Defendant denied having committed, the Defendant would have been forced into what would have amounted to a trial of the other crime, although at that time he had not even been formally accused of it. This would have invoked the well-settled rule that even where evidence of another crime is properly admissible it is irrelevant and improper to admit evidence of the details of such other crime. Wharton, Criminal Evidence, §174 at 343 (12th Ed.). Consequently, the testimony implicating Defendant in the alleged bank robbery simply could not be met adequately by any response Defendant could make and inevitably must have prejudiced the jury.

The courts of this circuit have always been particularly sensitive to the balancing test, mentioned above, and scrupulous in requiring that the necessity for other-crime-evidence clearly outweighs the prejudicial effect before admitting such evidence. This is shown by such cases as Awkard v. U. S., 122 U.S. App. D.C. 165, 352 F.2d 641 (D.C. Cir. 1965); Brown v. U. S., 125 U.S. App. D.C. 220, 370 F.2d 242 (D.C. Cir. 1966); Luck v. U. S., 121 U.S. App. D.C. 151, 348 F.2d 763 (D.C. Cir. 1965). Luck v. U. S. illustrates this point well. There, despite the fact that virtually all American jurisdictions, state and federal, permit impeachment of a defendant who has taken the stand by introduction of evidence of prior convictions, the Court held that the trial judge has discretion as to whether or not to admit such evidence of prior convictions for impeachment depending upon whether the probative value is outweighed by the prejudicial effect. Applying the principle, in Brown, supra, the Court held that it was error to deny defendant's request to rule that his prior conviction was inadmissible where he refused to take the stand because of such denial and where his testimony would have been a crucial element in the defense. In the present case, the interest in preventing undue prejudice against the Defendant clearly outweighs any possible evidentiary significance as to intent with respect to evidence strongly suggestive of Defendant's guilt of another major crime.

VI BRYANT'S CONVICTION MUST BE REVERSED BECAUSE THE DISTRICT COURT REFUSED TO GIVE THE JURY PROPOSED INSTRUCTION REGARDING DEFENDANT'S MENTAL CONDITION AS PRECLUDING PREMEDITATION.

One of the chief issues raised at the trial was that of

Defendant's mental soundness as it bore upon his intent and ability to premeditate and deliberate. There was considerable testimony regarding Defendant's mental condition at the time of the killings. Dr. Don T. Mosher testified that the Defendant was suffering from a mental disorder at the time (Tr. 616), and that this disorder could be characterized as an antisocial personality with paranoid traits (Tr. 620). Dr. Mosher testified further than in situations of confrontation, the Defendant was likely to encounter anxiety and mounting tension which activated a mechanism causing him to act in a way to discharge this mounting tension (Tr. 629). Dr. Jonas Rappeport also testified that the Defendant was suffering from a sociopathic or antisocial personality with paranoid features at the time of the incident (Tr. 777), and that Defendant had little control over himself and that his impulses completely took over at the time of the killings. Dr. Leonard H. Ainsworth testified that Defendant has a sociopathic personality with paranoid features. (Tr. 852).

In view of the evidence presented, the defense proposed the following instruction:

> If the members of the jury are not satisfied from the evidence that the defendant, at the time he committed the acts, was so mentally unsound as to render him not guilty by reason of insanity; yet if the jury find[s] from the evidence that there was such a degree of mental unsoundness existing at the time of the homicide as to render the defendant incapable of premeditation and of forming such an intent as the jury believe[s] the circumstances of this case would reasonably impute to a

> man of sound mind, they may consider such degree of mental unsoundness in determining the question whether the act was first degree murder or second degree murder. (Defense Proposed Instruction One.)

Many Courts have recognized that mental disorders may be such as to negate any of the elements of willfulness, deliberation and premeditation needed to establish a certain charge of murder in the first degree without disproving a malice aforethought which is sufficient to convict of murder in the second degree. See Perkins on Criminal Law, pp. 770-771 (1957 Ed.). These Courts have acted upon the theory that since deliberation and premeditation are necessary elements by definition of the crime of first degree murder, the Defendant should be permitted to introduce evidence of an abnormal mental condition, although not sufficient to establish legal insanity as a complete defense to or excuse for the crime, for the purpose of showing either that he did not have the capacity to, or in fact did not, deliberate or premeditate the act at the time the homicide was committed, and that for this reason only, murder in the second degree was in fact committed. Cases adopted this theory are listed in the annotation, "Mental or Emotional Condition as Diminishing Responsibility for Crime", 22 ALR 3d 1228, 1246-1247 (1968). If evidence is admissible for this purpose, then, of course, the Defendant is entitled to an instruction such as that offered by the defense in the instant case. That instruction was not intended as a substitute for the definition of legal insanity. Rather, the instruction regarding Bryant's mental condition was offered so that the jury might specifically consider Defendant's

mental condition in determining whether or not Defendant was capable of the premeditation and deliberation which were essential elements of the crime for which he had been indicted. In refusing the instruction, the trial judge refused to allow the jury to decide if the Defendant's abnormal mental condition made any crime committed of a lesser degree than that with which Defendant was charged.

Among the cases in which the diminished responsibility theory was applied is People v. Henderson, 35 Cal. Rptr. 77, 386 P. 2d 677 (Cal. 1963). In that case, the defendant was convicted of murder in the first degree, but on appeal to the Supreme Court of California, it was held that failure to instruct on the defense of diminished responsibility was prejudicial error, even though such instruction had not been requested. The Henderson Court said:

> . . . [W]here . . . substantial evidence sufficient to inform the court that defendant is relying upon the defense of diminished responsibility is received, it must on its own motion instruct the jury as to the legal significance of such evidence, for such an instruction is "necessary for the jury to be fully and fairly charged upon the relevant law." (At p. 682, citations omitted.)

The proposition that a defendant is entitled to an instruction on "diminished responsibility" in cases where there is any evidence concerning a defendant's mental inability to deliberate, is often analogized to the rule which applies in the case of voluntary intoxication. In the District of Columbia, though intoxication is no excuse for crime, it is allowed as a defense insofar as it shows that a defendant's mental condition was such that he was unable

to form a specific intent at the time of an alleged crime. See Heideman v. United States, 104 U.S. App. D. C. 128, 259 F.2d 943 (1958), cert. den., 359 U.S. 959 (1959); Womack v. United States, 119 U.S. App. D. C. 40, 336 F.2d 959 (1964). In King v. United States, 125 U.S. App. D. C. 318, 372 F.2d 383 (1966), this Court implicitly recognized the close connection between a "diminished responsibility" instruction based on intoxication and one based on mental condition:

> On retrial it would be better, to obviate any possible misunderstanding, for the court to advise the jury explicitly that although involuntary intoxication is not a defense to the crime, the jury may give consideration to appellant's claim of intoxication, together with the testimony of the psychiatrists concerning the interaction of appellant's recourse to alcohol and her mental condition, in the course of determining the issue raised by the insanity defense, i.e., whether the Government had established beyond a reasonable doubt the elements of appellant's criminal responsibility . . . . (125 U.S. App. D. C. at 333.)

In State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959), the trial court had refused to instruct the jury that they might consider mental defects and mental condition in ascertaining whether or not the defendant had the power to deliberate the acts charged, so as to reduce the charge from first degree murder to second degree murder. The Supreme Court of New Mexico held that the failure to give the instruction was reversible error and remanded for a new trial. Discussing the issue involved here, the Court said:

> However, the question immediately arises as to why there should be a different rule and perhaps a more lenient one with respect to a user of alcohol or drugs than in the case of one who may be afflicted with a mental disease not of his own making. If alcohol or drugs can legally prevent a person from truly deliberating, then certainly a disease of the mind, which has the same effect, should be given consideration. (At p. 315)

It is submitted that since the United States Court of Appeals for the District of Columbia has accepted the defense of voluntary intoxication as negating a specific intent, it should accept the reasoning of the Court in State v. Padilla, supra, and should rule that it was prejudicial error for the trial court to refuse Defense Proposed Instruction One.

VII. BRYANT'S CONVICTION MUST BE REVERSED BECAUSED THE COURT INSTRUCTED THE JURY THAT PREMEDITATION MIGHT BE INSTANTANEOUS.

Bostic v. United States, 68 App. D. C. 167, 94 F.2d 636 (1937), cert den., 303 U.S. 635 (1938), involved an appeal from murder in the first degree. At issue was whether the defendant had had sufficient time to deliberate between the formation of the design to kill and the actual execution of that design. In affirming the conviction the Court reviewed the authority upon the amount of time necessary for deliberation. The Court said:

> In one jurisdiction it has been said that deliberation may be present even though the act of killing follows the intention to kill as instantaneously as successive thoughts of the mind . . . . In others the courts have insisted that some appreciable time must elapse in order that reflection and consideration amounting to deliberation may occur . . This is the better statement of the rule. (At p. 171, citations omitted.)

In the present case, there is evidence to sustain a finding that the Defendant did not know of the presence of the FBI agents at his door prior to his responding to a knock. In fact, in his closing argument, counsel for the Government apparently concedes that in all probability the Defendant went to the door expecting that his wife had just returned to the apartment (Tr. 1968). There is no evidence that Defendant had drawn his gun prior to responding to the door, and in fact counsel for the Government also apparently concedes that carrying a gun to the door does not prove that Defendant answered the door with an intent to commit violence, since he continuously went about armed (Tr. 1978).

The conversation at the apartment door lasted less than some twenty-five (25) seconds. This period was probably the only time in which Defendant might have deliberated and premeditated sufficiently to sustain a charge of first degree murder. It was against this evidentiary background that the District Court charged:

> . . . the process of premeditation and the formation of a design to kill may be virtually instantaneous, as quick as the process of thought itself . . . . (Tr. 1101.)

In Austin v. United States, 127 U.S. App. D.C. 180, 382 F.2d 129 (1967), the defendant was indicted for first degree murder. The evidence showed that the victim had suffered approximately twenty-six (26) major stab wounds, and at least the same number of superficial lacerations. In that case, the Court said:

> The violence and multiple wounds, while more than ample to show an intent to kill, cannot, standing alone, support an inference of a calmly calculated plan to kill, requisite for premeditation and deliberation, as contrasted with an impulsive and senseless, albeit sustained, frenzy. (127 U.S. App. D.C. 190.)

In the Austin case, the Court indicated that a charge to the jury in terms of the sufficiency of seconds for premeditation and deliberation was defective. As was said in Austin:

> In 1937, we abandoned an earlier conception that deliberation and premediation may be instantaneous, and held in Bostic v. United States that "some appreciable time must elapse in order that reflection and consideration amounting to deliberation may occur." (127 U.S. App. D.C. at 186.)

It is submitted that the instruction of the District Court in this case that the process of premeditation and the formation of a design to kill may be virtually instantaneous was a return to the standards set in the pre-Bostic cases, and thus constitutes reversible error.

CONCLUSION

For the reasons stated under each of the points above, Defendant's conviction must be reversed.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,748

UNITED STATES OF AMERICA, APPELLEE

v.

BILLIE AUSTIN BRYANT, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

HAROLD H. TITUS, JR.,
Principal Assistant United States Attorney.

JOHN A. TERRY,
RICHARD A. HIBEY,
PHILIP L. COHAN,
Assistant United States Attorneys.

Cr. No. 849-69

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INDEX

TABLE OF CASES

Cases—Continued

Cases—Continued — Page

OTHER REFERENCES

* Cases and authorities chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether the trial court abused its discretion in declining to conduct an individual voir dire examination of each prospective juror out of the presence of other prospective jurors?

2. Whether the trial court erred in not *sua sponte* ordering a transfer of venue?

3. Whether appellant was tried upon a properly drawn and constituted indictment?

4. Whether evidence of prior criminal conduct was admissible on the issue of appellant's state of mind?

5. (a) Whether the trial court properly refused to give appellant's proposed instruction on diminished responsibility?

(b) Whether the trial court properly instructed the jury with respect to premeditation and deliberation?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By an indictment filed March 5, 1969, appellant was charged with two counts of first-degree murder of an employee of the Federal Bureau of Investigation, in violation of 18 U.S.C. §§ 1111(a) and 1114 (counts 1 and 3), and two counts of first-degree murder in violation of 22 D.C. Code § 2401 (counts 2 and 4). Following the Government's election to proceed only on the D.C. Code offenses and dismissal of the U.S. Code offenses, trial commenced on October 21, 1969, before the Honorable Gerhard A. Gesell and a jury. On October 27 the jury returned its verdict of guilty of both D.C. Code

offenses and, following additional instructions, retired to deliberate upon the issue of punishment. Being unable to agree upon punishment, they were dismissed on October 28. On November 3 the court imposed a sentence of life imprisonment as to each of the two counts, such sentences to run consecutively to each other and consecutively to a sentence then being served by appellant. This appeal followed.

The Pre-Trial Motions for Change of Venue and for Dismissal of Counts 2 and 4 of the Indictment

On May 1, 1969, appellant moved for a change of venue, and on June 2 the Government responded to that motion, stating it did not oppose the change. On June 6 the court filed a memorandum in which, after stating its opinion that appellant would receive a fair trial in this jurisdiction, it granted appellant's motion and further stated "[t]he D.C. Code counts (2 and 4) are not transferable and must be dismissed."

On June 12 the Government moved to reinstate counts 2 and 4, and a hearing on this motion was held on June 13. In opening that hearing the court stated: "Gentlemen, I think we should first consider the place to which this case is to be transferred *and then consider the question of whether the D.C. counts go with the case or whether they are dismissed, as the court has ruled*" (emphasis added) (June 13 Tr. 27).[1] Speaking to both counsel on this same issue later in the hearing, the trial court stated: "I have been in trial all morning and I have not had a chance to read all the cases. I intend to take this question under advisement in any event. That would mean that you may within a reasonable time submit any memorandum of authorities. I would not wish to foreclose you in any way with respect to that" (June 13 Tr. 36). Thereafter the court continued to discuss

[1] Transcripts of pre-trial hearings are referred to by date and page number (*e.g.*, June 13 Tr. 27), whereas the trial transcript is referred to simply by page number.

this issue with counsel for the Government in a manner clearly reflecting that the court had not yet satisfied itself as to whether the D.C. Code counts could follow the transfer of venue to another district. This hearing concluded with the court twice indicating that it had not yet finally ruled as to the counts and that transfer of venue would be delayed until such ruling had been made (June 13 Tr. 51, 52). The Clerk's Certificate reporting on this hearing recites:

> . . . whereupon the question of jurisdiction on change of venue is heard and case is to be sent to the U.S. District Court for the Eastern District of Virginia, Richmond, Virginia. (Order to be presented.)
>
> Thereupon the motion of the Government to reinstate Counts two and four of the indictment is heard and taken under advisement.

On June 23[2] appellant's co-counsel, Theodore Christensen, filed a motion to withdraw as counsel, and Leroy Nesbitt, appellant's principal counsel, filed a "Motion for Leave to Withdraw Motion for Change of Venue and Transfer from the District of Columbia for Trial." The Government consented to this latter motion on June 25. At the ensuing hearing on June 27 the court granted appellant's motion to withdraw his previous motion for change of venue, denied Mr. Christensen's motion to withdraw as counsel, and declared moot the Government's motion to reinstate counts 2 and 4 of the indictment. The Clerk's Certificate confirms this action.

In commenting upon appellant's motion, Mr. Nesbitt unequivocally advised the court that he felt a fair trial could be provided by this trial court (June 27 Tr. 58) and that his motion was based on the fact that transfer of the case from the District of Columbia would necessitate the removal of Mr. Christensen as co-counsel. Mr. Nesbitt expressly denied that he was withdrawing appellant's prior motion because of the court's selection of

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[2] The record reflects that Mr. Nesbitt's motion was filed June 23 but that Mr. Christensen's motion was not filed until June 27.

Richmond, Virginia, as the situs of the trial. Rather, he explained that he had not been aware of the fact that Mr. Christensen would be unable to assist in appellant's defense outside of this jurisdiction and that in his opinion Mr. Christensen's services were invaluable to the defense (June 27 Tr. 54).

On October 17, because of differences between the U.S. Code and D.C. Code offenses charged in the original indictment respecting the jury's function with respect to punishment, the Government elected to proceed on just the D.C. Code offenses and to dismiss the U.S. Code offenses (Oct. 17 Tr. 5). Immediately thereafter the court stated:

> Now, I will say to counsel at this state that I would think the appropriate way to proceed, in order not to raise any questions in the jury's mind, would be to retype the indictment as a Title 22 indictment, only in two counts, and then we would all be talking about the same indictment, the same form, and the same count numbers.
>
> Is that satisfactory?
>
> MR. NESBITT: Yes, Your Honor. (Oct. 17 Tr. 6.)

Pursuant to this agreement the indictment was retyped and was filed with the clerk on October 27, 1969. With respect to the indictment's new form the court stated on October 20:

> Now, gentlemen, I have arranged to have the indictment recast in accordance with the action taken on Friday [October 17]. I have copies here. I would like to make them available to counsel on both sides so that if there is any problem with the form in which the Court proposes to submit the indictment to the jury, you can advise me tomorrow. I am not trying to press you now. We have all had a long day. (Tr. 220.)

Appellant made no objection to this procedure either then or later.

The Voir Dire

On August 6, 1969, the trial court advised counsel for both parties that it would conduct the voir dire examination of the jury and instructed counsel to submit to the Court, one week in advance of trial, any questions which they wished to be addressed to the prospective jurors (Aug. 6 Tr. 117). In its memorandum dated August 7 the Court repeated this advice. In its memorandum dated October 17 the Court again declared that it would conduct the voir dire and specifically stated that it would not individually interrogate each prospective juror, giving its reasons as follows:

> Individual voir dire of each juror is impractical, unnecessary and not in the interests of justice. The jury, when chosen, will be sequestered. Selection of a jury may well involve a prospective panel of 150 or more. Individual questioning of each member of the panel will require several days. Publicity will issue and there is no feasible way of sequestering the panel while the selection process takes place. In the event particular responses of individual jurors suggest to the Court further individual interrogation of the juror, this can be done at the bench in accordance with the long-established practice in this jurisdiction. The state court practice of individual interrogation has recently been illustrated in the *Ray* and *Sirhan* cases, and not only proved time-consuming but tended to personalize jurors under the glare of publicity in a fashion that is inconsistent with the dignity of federal court practice. Trial by voir dire is offensive and certainly unsuited to this case. The ABA-recommended standards do not have the thrust defendant's cited excerpt suggests. The Court will develop techniques designed to deal fairly with the problems as they arise, tailoring procedures to the exigencies of this trial. This is the procedure encouraged by the Court of Appeals and entirely fitting in this instance. *United States* v. *Ridley*, [134 U.S. App. D.C. 79, 412 F.2d 1126 (1969)]. *Cf. Silverthorne* v. *United States*,

400 F.2d 627, 635-640 (9th Cir. 1968); *Rizzo* v. *United States*, 304 F.2d 810 (8th Cir. 1962).

At a pretrial conference on October 17 the aforementioned memorandum was distributed to counsel, and the court invited counsel's response. Mr. Nesbitt objected to the court's having made its ruling prior to hearing any argument. To this the court replied that it was quite willing to revoke, change or alter its ruling after counsel's argument (Oct. 17 Tr. 11). In reciting appellant's objections to an *en masse* voir dire Mr. Nesbitt stated that he was not requesting the court to interrogate each juror individually with respect to every question, but rather he requested only that in certain unspecified areas the court conduct an individual examination of the prospective jurors, not only with respect to their responses but as to the court's questions as well (Oct. 17 Tr. 12-14). In response to this suggestion the court stated: "Well, if as it proceeds you reach a point where you think the panel has been tainted [by the court's questions], you may advise the Court" (Oct. 17 Tr. 15). The Court then declined to amend its ruling.

The voir dire commenced on October 20, shortly after the opening of proceedings on that day at 9:30 a.m., and was concluded at approximately 3:30 p.m. The prospective jurors were advised that if they had occasion to respond to any question, they were to rise and state their name into the microphone which was passed among them. The Court's first questions pertained to the fact that the jury selected would be sequestered. Following these questions, numerous prospective jurors were excused from the first panel because of illness or personal inconvenience, and a new panel was added to those prospective jurors who remained. This procedure met with the explicit approval of Mr. Nesbitt (Tr. 42). While awaiting a new panel the court inquired whether any remaining jurors would, on account of any special circumstances, be "uncomfortable" or "disquieted" by serving on a sequestered jury. Responses to this question were taken at the bench (Tr. 44-73). The new panel

was sworn and questioned respecting illnesses or personal inconveniences which might excuse them from a sequestered jury, and thereafter they too were questioned regarding any "special circumstances." Responses were again taken at the bench (Tr. 90-100), and additional prospective jurors were excused.

The court next directed its inquiries to the subject of publicity and instructed any prospective juror who had heard "anything" about this case to stand. The court explained "anything" to include newspapers, radio, television and word of mouth, whether such information was recent or not (Tr. 115). Some jurors arose at this point. The court asked those who were standing whether they had ever expressed an opinion as to the guilt or innocence of appellant but received no response. The court then asked whether any of those standing jurors had such an opinion, even though never expressed, and again received no response. The court next inquired whether any standing juror would be unable to ignore his prior knowledge of this case, and again no response was given. Then the court asked whether any standing juror had a fairly clear recollection of the details of this case based on what he had read or heard. To this question several jurors responded and were invited to the bench (Tr. 116). The court addressed the remaining standing jurors as follows:

> There is one thing to have sort of a passing knowledge of some kind from casually reading a paper. I am asking you now whether any of you go beyond that and have, in your own mind, a feeling that you have some details that you recall about the case from what you read. And anyone who feels, he or she, that they have *any details of any kind* that they carry with them in their minds from what they have read or heard, would you come to the bench one at a time with counsel. . . . The rest of you may be seated at this time. (Tr. 116-117) (emphasis added).

At this juncture appellant's counsel expressed his agreement with the court's decision to ask these questions

prior to giving the prospective jurors any description of the case so as to sort out the "most obvious situations" first. Thereupon responding jurors were examined at the bench, and following the examination of the first such juror appellant's counsel commented, "I see the wisdom of Your Honor's method now" (Tr. 119). That first juror was excused, as were the remaining three jurors who responded to the court's last question. At this point Mr. Nesbitt declined to suggest to the court any further questions on the subject of publicity, stating that he was anticipating that the court would further advise the panel of the details of this case to see if such added details would "shake their memory" (Tr. 127).

The court then advised the prospective panel of appellant's name, the fact that he was accused of killing two F.B.I. agents, the date and location of the offense, and the date, hour and location of the arrest. Then the court inquired whether any prospective jurors, in view of this additional information, now felt that they had a recollection of this case. There was no response (Tr. 128). Mr. Nesbitt then expressed his approval of the court's most recent examination at the bench but added that since many more jurors had stood following the court's first inquiry as to any knowledge of this case, but then sat down after the court's further explanation regarding "passing knowledge" (as quoted above), these jurors should also each be examined at the bench. The court declined to accept counsel's suggestion, and appellant's subsequent motion to strike all those jurors who had stood was denied (Tr. 130). However, the court did instruct each juror who had stood to stand again and state his name. Following this the court again asked those persons who had just given their names whether they had "any detailed knowledge of this case based upon what . . . [they had] read in the newspapers or otherwise" (Tr. 133), and the only responding prospective juror was interrogated at the bench.

The court next inquired whether any of the prospective jurors had such fixed views on the subject of capital

punishment that they would necessarily vote either for or against such punishment (Tr. 134-136). Of the persons who stood in response to this question, those who then responded affirmatively to the further question whether they would vote against the death penalty regardless of the evidence were excused (Tr. 137), and the three prospective jurors who remained standing were further questioned at the bench. Two of these were excused after questioning (Tr. 140, 143). Further questions on this subject were directed to the panel, but no responses were forthcoming. Following these questions appellant's counsel stated that he requested no further inquiry on this topic (Tr. 145).

The remaining questions to the prospective jurors asked whether they were acquainted with appellant, counsel or any of the proffered witnesses; whether they worked for, or were closely related to, anyone working for the F.B.I. or any other law enforcement agency; whether they had studied law or medicine or had special training in criminal technology; and whether they had fixed opinions as to expert testimony (Tr. 145-188). The prospective jurors were also asked whether they lived in the area of the offense or arrest and whether they were aware of the police activity in those areas on the dates in question (Tr. 182-183); whether they had a settled belief respecting the mental condition of one who would commit a killing with a gun (Tr. 188); and, finally, several concluding questions of a general nature, in no way unique to this case. Thereafter the court inquired of counsel whether they had any additional questions, and appellant's counsel said he did not, "subject to our other statements" (Tr. 190).

After a short recess during which the court was informed by members of the prospective jury that one of their number was hard of hearing, that person was questioned and excused (Tr. 194-197), and a jury was then placed in the box. After eighteen strikes each by both the Government and appellant, a jury of twelve was selected (Tr. 197-212); four alternate jurors were then

selected after the exercise of two strikes each by the Government and appellant (Tr. 212-214). The jurors were then shown photographs of the two victims, and, when no juror recognized these photographs, the jury was sworn (Tr. 216).

Before adjournment, counsel for appellant volunteered to the court:

> Your Honor, may I just say on the record that I want to express my appreciation to the Court for an expedited manner in which this voir dire was handled, and I believe that the Court covered, in essence, much of what we requested, outside of the scope of those things we had objected to. I appreciate the manner in which it was conducted. (Tr. 220.)

The Government's Case

In his opening statement the prosecutor read the two-count indictment charging appellant with violating 22 D.C. Code § 2401, and further informed the jury that the Government's evidence was expected to show that appellant escaped from Lorton Reformatory on August 23, 1968, and was still a fugitive on January 8, 1969, when, at approximately 11:15 a.m., he was observed pointing a gun at two individuals (Tr. 227-228).

At the conclusion of the government's opening statement appellant moved for a mistrial, claiming that the comments of the prosecutor respecting anticipated testimony concerning appellant's criminal conduct forty-five minutes prior to the alleged offenses charged in the indictment was inadmissible and prejudicial. The court denied appellant's motion and repeated its "previous indication" that this evidence concerning appellant's prior conduct was relevant to the issues of intent, deliberation and premeditation (Tr. 230). Thereafter the court instructed the jury that evidence of possible prior criminal behavior may be considered only as to appellant's state of mind and was not to be considered as having any bearing on his guilt or innocence of the offenses with which he was charged (Tr. 231-232).

The Government then proceeded to put on its case. Evidence was introduced showing that appellant had been committed to Lorton Reformatory on April 5, 1968, to commence serving a sentence of eighteen to fifty-four years, and that appellant escaped from this commitment on August 23, 1968.

Before the Government's second witness was sworn, appellant renewed his objection to evidence concerning alleged conduct in conjunction with a Maryland bank robbery on the morning of January 8, 1969. In permitting the Government to proceed with this evidence the court ruled that such evidence was relevant and material in showing that appellant was seen with a gun less than an hour prior to the shootings, and in showing that appellant had reason to seek escape from the authorities (Tr. 240-241). Thereupon the Government presented evidence showing that appellant had been in the Citizens Bank of Maryland in Oxon Hill, Maryland, at approximately 11:10 or 11:15 a.m. on January 8, 1969, and there pointed a gun at two tellers[3] (Tr. 242-249).

Subsequent testimony from F.B.I. Agent George T. Sullivan showed that Agent Sullivan, together with Agents Edwin Woodriffe and Anthony Palmisano, confronted appellant at the entrance to apartment 12, 133 Yuma Street, Southeast, in Washington, D.C., at approximately 11:40 a.m. on January 8, 1969. Agent Sullivan testified that their purpose in going to this apartment was to speak to appellant's wife in the hope of determining the whereabouts of appellant, who was a suspect in the bank robbery which had just occurred in Maryland. They had reason to believe that appellant was not then present in apartment 12. Moreover, they did not then know appellant's full name, nor did they even know what he looked like (Tr. 300). After the agents knocked,

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[3] Appellant was convicted on April 14, 1969, in a state court in Maryland (Circuit Court of Prince Georges County, Criminal Trial No. 8666) of robbery of the Citizens Bank on January 8, 1969, and that conviction was affirmed by the Maryland Court of Special Appeals on May 5, 1970.

the door to apartment 12 was opened approximately halfway by appellant, who concealed his body behind the door, exposing only his head. Agent Woodriffe inquired whether Mrs. Bryant was at home and was advised that she was not, that she had left. Agent Woodriffe then asked appellant what his name was, and appellant replied, "Freeman." Agent Woodriffe next identified himself as being with the F.B.I. and requested permission to enter and talk. Appellant replied that the lady of the house was not at home and he could not invite anybody in. Agent Woodriffe then leaned forward and repeated his request to talk to appellant. At this point appellant began firing (Tr. 301-302). Agents Woodriffe and Palmisano were both struck by bullets from appellant's gun and subsequently died from these wounds. Agent Sullivan returned appellant's fire. Agent Sullivan estimated that approximately two or three minutes elapsed from the start of the conversation with appellant until the shooting started (Tr. 350).[4]

Subsequent Government evidence was introduced to show that appellant was arrested in the evening of the same day while concealed in an attic at 167 Mississippi Avenue, Southeast, at which time he had in his possession a fully loaded .38 caliber police special revolver (Tr. 374-376). Testimony from a ballistics expert showed that bullets recovered from the bodies of Agents Woodriffe and Palmisano had been fired from this gun (Tr. 471).[5]

Appellant's motion for judgment of acquittal at the conclusion of the Government's evidence was denied.

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[4] Upon cross-examination of Agent Sullivan appellant attempted to demonstrate that this conversation took no more than twenty-five seconds (Tr. 352-353).

[5] Special Agent Cortland Cunningham testified that the bullet removed from Agent Woodriffe and the bullets removed from Agent Palmisano's shoulder had been fired from appellant's gun, and that the bullet removed from Agent Palmisano's back, while not positively identified as being fired from appellant's gun, had not been fired by any of the weapons carried by Agent Palmisano, Woodriffe or Sullivan (Tr. 471-472).

The Defense

Appellant testified that on the morning of January 8, 1969, he answered a knock on the door to his apartment at 133 Yuma Street, opened the door about halfway and saw three men. Agent Woodriffe asked if Mrs. Bryant was home, and appellant said she was not, that she had just left. Woodriffe next asked appellant what his name was, and appellant responded by giving him an alias. Agent Palmisano then said, "You are Billie Bryant, aren't you?" and appellant replied "No." Agent Palmisano then reached for his gun and said, "We are from the F.B.I." The Negro man (Woodriffe) then knocked the door in on appellant and told him not to try anything. At this point appellant heard a gunshot; he turned around and "shot the first person closest to me" (Woodriffe) and then shot, two or three times, the man who was firing at him (Palmisano) (Tr. 493-494, 537-539). "Woodriffe fell back out of the apartment" and "Palmisano was throwed back into apartment door ten and rolled off the wall" (Tr. 495). Appellant testified that he had carried his gun with him to answer the door, had taken it out of his trousers and was holding it in his hand, but did not fire until after Agent Palmisano had drawn his gun and a shot had been fired. He did not know who fired that shot but assumed it was Agent Palmisano (Tr. 536).

Appellant denied having been in the Citizens Bank of Maryland earlier on January 8, but he admitted having escaped from Lorton Reformatory in August 1968 and living in Baltimore under an assumed name to avoid apprehension (Tr. 547). He stated that he had spent the night of January 7 at 133 Yuma Street and had hitch-hiked to Baltimore in the early morning hours, talked to some friends for about four hours, and hitch-hiked back to Washington (Tr. 550-553).

Appellant then offered expert opinion to show that he suffered from a mental disorder identified as "anti-social personality with paranoid traits" (Tr. 620, 777); was

so suffering on January 8, 1969; and, as a result, when confronted by Agents Palmisano, Woodriffe and Sullivan, felt intense anxiety (Tr. 635) and a compulsive need to overcome them (Tr. 727). It was also offered, however, that appellant knew that "it would be generally disapproved to kill somebody" (Tr. 681), that he possessed the ability to plan, and that he was not suffering from any organic brain damage (Tr. 691) and possessed "bright-normal to superior" intelligence (Tr. 668).

Dr. Don T. Mosher, a psychiatrist, expressed his opinion that appellant shot the two F.B.I. agents more in order to avoid an intense and overwhelming anxiety which would arise from "backing down" to the authorities, rather than from a fear of apprehension or injury (Tr. 746-748). Dr. Mosher then explained his opinion that appellant did not "shoot his way out" of the arrest because appellant thought that the authorities were out of range (Tr. 751), "that he didn't think he could get him" (Tr. 760); yet this doctor nevertheless felt that there was "a very high probability" that under conditions of stress appellant would "shoot his way out" (Tr. 752). "This is one of the characteristics of his mental disorder, that by acting aggressively he averts and forestalls the coming into consciousness of intolerable anxiety" (Tr. 758).

Dr. Jones Rappeport, another psychiatrist, stated his opinion that appellant was driven to commit the shootings in question by impulsive behavior (Tr. 782-783), that he was a disordered individual (Tr. 801), and that on January 8, 1969, appellant felt that the F.B.I. agents were challenging him and were going to shoot him (Tr. 825).

Leonard H. Ainsworth, Ph.D., a psychologist, testified to having administered four psychological tests to appellant and diagnosed appellant's mental condition as antisocial personality with paranoid features (Tr. 852).

The Government's Rebuttal

Dr. Mauris Platkin, a psychiatrist, testified that on the basis of his four examinations of appellant and examinations by his associates, he formed the opinion that appellant was not suffering from any mental disease or disorder on January 8, 1969 (Tr. 975); that on January 8, 1969, appellant was capable of differentiating right from wrong (Tr. 985); that although he exhibited some symptoms associated with "a sociopathic personality with paranoid features," these symptoms were not sufficient to warrant diagnosing him as a sociopath (Tr. 986) or as being mentally diseased (Tr. 988). Dr. Platkin opined that as of January 8, 1969, appellant was capable of making a plan and was aware of the situations around him (Tr. 989-990).

Dr. Nicola Kunev, a psychiatrist, testified on the basis of three examinations that appellant was not, in his opinion, suffering from any mental illness on January 8, 1969 (Tr. 995). Dr. Daniel Duncan Pugh, another psychiatrist, stated his similar opinion (Tr. 1003).

Instructions

At the close of all the evidence, and prior to closing argument, appellant submitted a proposed instruction on the question of diminished responsibility. The trial court refused to give that instruction to the jury, stating, "That is not the law in this jurisdiction" (Tr. 1027).

Thereupon the court gave its instructions to the jury. The only portion of those instructions which is germane to this appeal concerns the premeditation and deliberation elements of first-degree murder, about which the court said:

> Although the process of premeditation and the formation of a design to kill may be virtually instantaneous, as quick as the process of thought, itself, it is necessary that an appreciable time elapse between the formation of the design to kill and the

> fatal act, within which time there is in fact deliberation. The law prescribes no particular time for the process of deliberation. It necessarily varies according to the circumstances of each case. Consideration of the matter may continue over a prolonged period or a very short one. If one forming an intent to kill does not act instantly but pauses and actually gives second thought and consideration to the intended act, turns it over in his mind, he has in fact deliberated, and it is the fact of deliberation that is essential, not the length of time it may be continued or over which it may have taken place. (Tr. 1101.)

This charge was repeated substantially verbatim (Tr. 1128-29) in response to the jury's request for further clarification on the elements of first- and second-degree murder.

ARGUMENT

I. The trial court did not abuse its discretion in declining to permit an individual voir dire examination of each prospective juror.

(Oct. 17 Tr. 11, 41; Tr. 102)

Appellant contends that the trial court's decision to address the prospective jurors collectively, when asking questions of a general nature, resulted in a denial of appellant's constitutional right to a fair and impartial trial. More pointedly, appellant claims that the trial court disregarded its obligation to conduct its voir dire in a manner calculated to protect these rights. Appellee submits that such accusation is entirely without support in the record and, in fact, constitutes a clear disregard of the trial court's efforts to assure appellant a fair trial.

Although, as appellant argues, the trial court's memorandum dated October 17, 1969, was its first advice of the denial of appellant's request for an individual voir dire outside the presence of other prospective jurors, such memorandum was in fact delivered in response to

appellant's "Request for Individual Examination of Prospective Jurors" filed with the court on October 13. Such being the case, appellee is unable to understand appellant's assertion that he had been foreclosed from presenting his views on this subject. Moreover, the court clearly stated that it was prepared to amend or alter its ruling following further argument (Oct. 17 Tr. 11).

Upon addressing himself to the merits, appellant urges that the collective questioning of prospective jurors could possibly have resulted in some jurors being influenced by the behavior or answer of others, yet he does not state with any particularity what questions or what responses he had in mind when making this argument. Since his brief does imply, however, that his concern lies in the area of publicity, appellee has emphasized in its counterstatement those questions in the voir dire which examine this subject.

It is of course clear from Rule 24(a), FED. R. CRIM. P., that the manner in which the voir dire is conducted is discretionary with the trial judge, and it is equally well-recognized that this exercise of discretion will be interferred with only upon a clear showing of abuse of discretion. See *Silverthorne* v. *United States*, 400 F.2d 627, 638 (9th Cir. 1968), and cases cited therein. In the instant case there are clear and repeated indications in the record that the trial court was not unaware of the prior and present publicity attendant to this case nor of its duty to assure appellant a fair trial. Moreover, the memorandum of October 17, 1969, not only establishes the court's concern with, and research into, appellant's rights, but further sets forth the bases for the court's discretionary determination that it would not individually examine the prospective jurors absent a showing that there was a particularized need to follow that procedure. See pp. 5-6, *supra*. Appellee relies upon the authorities cited by the trial court.

The several cases cited by appellant fall far short of establishing the proposition urged in his brief. For example, in *Silverthorne* v. *United States*, *supra*, it was

established that each and every prospective juror had a prior knowledge of the facts of that case. This factor is, without question, the basis for the court's opinion that it would *prefer* individual examination. However, the *Silverthorne* court expressly declined to hold that the "massive publicity" surrounding that case required individual examination of the prospective jurors. Rather, because the court's questions were of too general a nature, and because these questions were designed to evoke subjective assessments by the jurors of their own impartiality, the court held that it was prejudicial error to deny appellant's request for individual examination. Similarly, in *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968); *United States* v. *Marcello*, 280 F. Supp. 510 (E.D. La. 1968), *aff'd*, 423 F.2d 993 (5th Cir. 1970), and the A.B.A. recommended minimum standards,[6] the conclusory recommendation for individual examination of each venireman is based on the premise of probable prejudice of the jurors from exposure to publicity. Appellee does not deny that the pretrial publicity surrounding the offenses charged in this case was considerable. However, the existence of publicity is not equivalent to the existence of residual prejudice. As the A.B.A. recommendations state, it is "the examination of each juror *with respect to his exposure* [that] shall take place outside the presence of other chosen and prospective jurors." *Fair Trial*, *supra* note 6, § 3.4(a), at 130 (emphasis added).

Appellant miscontrues the authorities he cites when he contends that each prospective juror should be individually examined to determine if in fact he has been exposed to "potentially prejudicial material." Rather, these authorities merely state their preference, or recommendation, for individual examination of those who *have announced* such exposure. In the instant case this is

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[6] AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *Fair Trial and Free Press* § 3.4(a), at 130 (Approved Draft 1968) (hereinafter cited as *Fair Trial*).

precisely the procedure which the court followed by calling each responding prospective juror to the bench.[7]

Moreover, upon evaluation of the trial court's exercise of discretion respecting the voir dire procedure in light of the related problems referred to in the court's memorandum of October 17, it becomes increasingly apparent that the court was motivated solely by its concern that the trial be fairly and impartially conducted. Of principal concern to the court was that the jury be sequestered to avoid exposure to publicity emanating from the commencement of trial proceedings. Practical considerations rendered sequestering of the entire panel[8] impossible, and thus the court was hopeful of empaneling the jury in one day.[9]

It is most significant that appellant has not in any way challenged the content of the voir dire.[10] This factor certainly distinguishes this case from the dicta relied upon by appellant in *Silverthorne* and *Patriarca*, *supra*, wherein the courts expressly stated their disapproval of the content of those voir dire examinations. By contrast, the instant voir dire was extremely thorough, and counsel for both parties were presented the opportunity

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[7] As noted above, those prospective jurors who stood after the court's initial questions on publicity, but sat down after the court amplified its question, were not examined at the bench. The court's failure to do so prompted appellant to move to strike these prospective jurors. Appellant's decision not to argue that the denial of this motion was error is no doubt prompted by his familiarity with the decisions in *Irvin* v. *Dowd*, 366 U.S. 717, 722, 733 (1961), and *Rizzo* v. *United States*, 304 F.2d 810, 816 (8th Cir. 1962).

[8] The panel still consisted of ninety prospective jurors prior to commencement of the examination respecting publicity (Tr. 102).

[9] However, even in expressing this desire, prompted as it was by the feeling that empaneling of the jury in one day would shield the jurors from possible prejudicial publicity, the court again indicated its concern that appellant receive a fair trial:

> My objective is going to be, if it is possible to do so, consistent with the requirements of a fair trial, to see if we can select the jury in one day. (Oct. 17 Tr. 41.)

[10] Nor did he suggest additional questions in the trial court when specifically afforded the opportunity to do so.

to expand that examination if they so chose.[11] Rather than offering additional questions, however, appellant's counsel in fact complimented the court on its conduct of the voir dire.

Accordingly, appellee submits that the instant voir dire fully and fairly examined each prospective juror with respect to any possible prejudice and, in particular, thoroughly explored the possibility of prejudice arising from exposure to pre-trial publicity. Moreover, even if this Court does not share our interpretation of the A.B.A. recommendations and appellant's authorities, we submit that under the circumstances of this case there was no abuse of discretion by the trial court in limiting its individual examination in such a way as to make probable the selection and sequestering of the jury in one day so as to avoid possible exposure to further publicity.

II. The trial court did not err in failing *sua sponte* to order a transfer of venue.

(Tr. 5, 189-190; June 13 Tr. 34; Oct. 17 Tr. 36)

Appellant argues (1) that he was compelled to submit to trial in this jurisdiction by the sanction of losing the assistance of his co-counsel, Mr. Christensen, if tried in any other jurisdiction; (2) that transfer of venue was conditioned upon appellant's acceptance of Richmond, Virginia, as the situs of trial outside this jurisdiction; and (3) that a fair trial was not possible within this jurisdiction.

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[11] It is also noteworthy that appellant exercised only eighteen of the twenty peremptory challenges available to him. "If defendant fails to exercise all of his peremptory challenges, he will have a hard time convincing the appellate court that the jurors were prejudiced." 8 MOORE, FEDERAL PRACTICE ¶ 21.03 (2d ed. 1969), citing *United States* v. *Moran*, 236 F.2d 361 (2d Cir.), *cert. denied*, 352 U.S. 909 (1956).

A. *The trial court did not compel appellant to relinquish his Sixth Amendment right to effective counsel.*

Appellant phrases his first argument above in terms of a denial of his Sixth Amendment right to effective assistance of counsel. In so doing, however, he totally disregards the intended, and well-recognized, meaning of that right. The Sixth Amendment assures appellant the effective assistance of counsel but does not bestow upon him the right to compel the court to appoint a particular attorney to represent him. *United States* v. *Burkeen*, 355 F.2d 241 (6th Cir.), *cert. denied*, 384 U.S. 957 (1966). "The constitutional guaranty to be represented by counsel does not confer upon the accused the right to compel the court to appoint such counsel as the accused may choose." *Tibbett* v. *Hand*, 294 F.2d 68, 73 (10th Cir. 1961); see *United States ex rel. Carey* v. *Rundle*, 409 F.2d 1210, 1215 (3d Cir. 1969); *United States* v. *Davis*, 365 F.2d 251 (6th Cir. 1966).

Furthermore, this is not a case wherein appellant was, in fact, deprived of effective assistance of counsel, and appellant does not suggest that it is. Rather, he argues that the ineligibility of Mr. Christensen to practice outside this jurisdiction was tantamount to a denial of appellant's right to the effective assistance of counsel. On this premise appellant asks this court to reverse his conviction because the trial court refused to rule, in advance of trial, that appellant would be denied his right to effective counsel if assisted by anyone other than Mr. Christensen. Notwithstanding the major contribution that Mr. Christensen undoubtedly made to the defense of appellant's case, it simply does not follow that his ineligibility to assist appellant further after a transfer of venue was *ipso facto* a deprivation of appellant's right to effective assistance of counsel as envisioned by the Sixth Amendment.

Moreover, it is totally inaccurate to assert that the trial court compelled appellant to elect between trial outside this jurisdiction without Mr. Christensen's assist-

ance and trial in this jurisdiction with his assistance. Ever since the creation of the Legal Aid Agency in 1960 by the enactment of the District of Columbia Legal Aid Act, Pub. L. No. 86-531 (1960), 2 D.C. Code § 2201-10, it has been the law that employees of the Agency were restricted to practicing within this jurisdiction. Accordingly, appellant's ignorance of that law, as well as the apparent ignorance of his counsel, cannot be said to be the fault of the trial court.

Finally, appellee knows of no case in which this or any other court has prospectively determined that counsel was ineffective,[12] yet it is just such a determination that appellant urges here. Moreover, he urges this determination as to *any possible* lawyer who might have been appointed to assist him. Appellee submits that the absence of any authority in opposition to this contention is occasioned by the absurdity of the contention itself.

B. *Transfer of venue was in no way conditioned upon appellant's acceptance of Richmond, Virginia, nor was it a denial of any right of appellant to select the new site for trial.*

Appellant's second assertion with respect to venue is simply inaccurate, and that inaccuracy has not been disguised by surrounding it with citations supporting well-recognized principles totally inapposite to appellant's argument. Appellant acknowledges that a motion for a change of venue is directed to the sound discretion of the court,[13] and, by implication from the authorities which he cites, he apparently also acknowledges that "[i]t is still very clear that any defendant who seeks a change of venue is presented with a formidable task." *United States* v. *Marcello*, *supra*, 280 F. Supp. at 515.

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[12] Appellee does recognize, however, that the method or timing of an appointment may, irrespective of the identity of appointed counsel, support a finding of ineffective assistance in advance of trial. See *Powell* v. *Alabama*, 287 U.S. 45 (1932).

[13] Rule 21(a), FED. R. CRIM. P.

He also acknowledges the relevance of Rule 21 (a), FED. R. CRIM. P., but his references to that rule raise serious doubts as to his familiarity with its provisions, for it expressly forecloses appellant's argument that he is entitled to designate a new situs pursuant to his request for trial outside the district of the offense.[14] This precise point should have come to appellant's attention while reading *United States* v. *Marcello*, *supra*, cited in appellant's brief at p. 14 and quoted at pp. 24-25, in which the court, in distinguishing *United States* v. *Parr*, 17 F.R.D. 512 (S.D. Tex. 1955), stated:

> Further, *Parr* involved a transfer from one division to another within the same district and was based on Rule 19 which, at that time, *required* the defendant to consent to the particular transferee district. It was to avoid the possible debilitating consequences of *Parr* that Rule 21 (a) was amended in 1966 to make it clear that the court may select the district to which the case may be transferred. 280 F. Supp. at 520.[15]

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[14] 8 MOORE, *supra* note 11, at § 21.03. It is also apparent that appellant's trial counsel was not ignorant of the trial court's right to select the new jurisdiction (June 13 Tr. 34).

[15] The court in *Marcello* also distinguished *United States* v. *Parr*, *supra*, on the basis that, unlike Parr, Marcello neither attempted to limit his request to any specified district nor even suggested a particular district. Appellant here is similarly situated, for his motion seeking a transfer did not mention any particular district. Rather, it was not until after the court in its memorandum dated June 6, 1969, selected Richmond, Virginia, "subject to suggestion of counsel," that appellant mentioned his preferences for Chicago, New York and Philadelphia.

Another similarity between the instant case and *Marcello* is that in each case the defendant first filed a motion to change venue and then moved to withdraw that motion. In speaking of this "tactic," the trial court in *Marcello* stated:

> The only plausible motive supporting such bizarre conduct is that the defendant is now merely seeking to prepare a record for appeal in the event that he is convicted. The defendant obviously wants two bites at the apple; such fast and loose play, however, is not favored in this Court . . . . [W]e refuse to allow a defendant, who has made a binding election, to renounce his choice when his renunciation stems from a

We point out that notwithstanding the absence of any right of appellant to select the situs of his trial, he nevertheless had the right to seek a further transfer of venue upon a showing that a fair trial could not be had in Richmond. However, appellant never pursued this course because transfer outside of this jurisdiction never occurred. The fact that the transfer did not occur brings us to the third point urged by appellant, and the observation that appellant himself was responsible for this jurisdiction's retaining control of his trial.

C. *A fair and impartial trial was not only possible within this jurisdiction, but it in fact occurred.*

In responding to appellant's third argument appellee is immediately confronted with the facts (1) that the trial court unequivocally and repeatedly stated its opinion that a fair trial could and would be had in this jurisdiction; (2) that appellant, through counsel, similarly concluded that a fair trial could be had in this jurisdiction; (3) that appellant withdrew his motion to transfer the case to another jurisdiction; and (4) that by extensively examining the prospective jurors and sequestering the selected jury, the trial court did all that it could to assure that appellant was tried by an impartial jury. Despite all this, appellant contends that by reason of the "wide publicity" received by this case a fair trial in this jurisdiction was impossible. In reaching this conclusion he relies in part upon the court's acknowledgment of this publicity in its memorandum dated June 6, 1969. Appellant errs, however, when he equates publicity with prejudice.[16]

"Heads-I-win-tails-you-lose" attitude and which is supported by absolutely no legally acceptable basis. The defendant would be in a better position if his action could be elevated even to the dignity of strategy or trial tactics. But his Janus-faced behavior falls miserably short of this mark. 280 F. Supp. at 522.

[16] Even if it had been shown (which it was not) that prejudicial publicity had come to the attention of the jurors, or further, that

Appellant claims that the trial court abused its discretion by not either denying appellant's motion to withdraw his prior motion for change of venue or *sua sponte* ordering such change. This claim must be evaluated in light of the court's persistent expression that a fair trial could be had in this jurisdiction, appellant's acquiescence in that opinion, and the absence of factors proving the converse to be true. Furthermore, appellant's claim must be viewed against the absence of federal court precedent for a finding of abuse of discretion arising from denial of a motion under Rule 21 (a). See 8 MOORE, *supra* note 11, at p. 21-9. Other than the court's memorandum of June 6, the reference to use of this case by federal employees in a labor dispute (Oct. 17 Tr. 36; Tr. 5), and mention of the controversial anti-crime program being pursued in this jurisdiction, appellant gives no evidence of having met his burden of showing "that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair trial . . . ." Rule 21 (a), FED. R. CRIM. P.

Appellant cites (Br. 14) four cases which presumably are offered as examples of environments no more prejudicial than that existing in this case and which he regards as therefore supporting his contention that the court erred in not directing the trial to be held in another jurisdiction. However, two of these cases do not even bear on the issue of whether the trial court abused its discretion in denying appellant's motion to change venue.[17] Rather, they discuss the issue of whether the

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from exposure to that publicity the jurors had formed an impression or opinion as to appellant's innocence or guilt, this would still not support appellant's conclusion that a fair trial was not possible. See *Irvin* v. *Dowd*, *supra* note 7; *Rizzo* v. *United States*, *supra*, note 7. *Compare Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

[17] *United States ex rel. Bloeth* v. *Denno*, 313 F.2d 364 (2d Cir. 1964); *Joelich* v. *United States*, 214 F.2d 950 (5th Cir. 1954).

The other two cases do not support a finding based on the instant record that pre-trial publicity necessitated a change of venue:

[Footnote continued on page 26]

jurors who convicted the defendant were sufficiently free of preconceived prejudicial opinions as to his guilt or innocence so as to afford him a fair trial. These cases discuss in detail the responses of the jurors during voir dire from which each trial court should have found (and each appellate court did find) the jurors unfit. The absence of similar responses by the prospective jurors in the instant case is, we submit, distinguishing.

If by citing these cases appellant means to argue that the instant conviction must be reversed because appellant was similarly tried by prejudiced jurors, he has failed to support such argument with any showing of such prejudice.[18] As we have stated, the concern here must be with actual prejudice, and where an extensive voir dire examination has failed even to suggest actual prejudice in those jurors not excused, appellant is left with no support for his argument. *Dennis* v. *United*

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[17] [Continued]

United States v. *Rossiter*, 25 F.R.D. 258 (D.P.R. 1960) is, appellee submits, of no moment to the instant appeal. In holding that the defendant's motion for change of venue under Rule 21 (a) should be granted, the court merely concluded that local sentiment would greatly handicap the defendant's right to a fair trial without further describing the degree of prejudice there present.

In *United States* v. *Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952), on the other hand, the court supported its ruling in favor of the defendant's motion for change of venue with reference to specific examples of a contaminated atmosphere. These examples included news articles from the New York World Telegraph, New York Daily News, New York Daily Mirror, New York Times and New York Herald Tribune, all published within one day of the scheduled trial date and all inflammotory and highly prejudicial to the defendant. In addition, the origin of much of this adverse publicity was attributed to the New York State Crime Commission. In commenting on the environment existing by reason of this publicity the court described it as "unique" and stressed its "critical timing."

[18] Appellant's only argument even approaching this issue is his reference in another section of his brief (Br. 21) to the limited examination of the eventually selected jurors. Appellee submits that no juror among those eventually selected exhibited any indication of prejudice and, moreover, that appellant's failure to exercise all of his peremptory challenges discredits any suggestion to the contrary. See note 11, *supra*.

States, 339 U.S. 162 (1950), *affirming* 84 U.S. App. D.C. 31, 171 F.2d 986 (1948).[19]

Accordingly, appellee submits that notwithstanding appellant's express desire at trial to be tried in this jurisdiction, there was neither a basis for ordering trial in a different jurisdiction, nor a showing of abuse of discretion by the trial court in failing so to order.

III. Appellant was convicted upon a properly drawn and constituted indictment.

(June 13 Tr. 27, 36-48, 51-52; Oct. 17 Tr. 6)

Appellant next asks this Court to follow him through several gymnastic maneuvers to conclude that he was tried upon an indictment void of any counts. By contending that the D.C. Code offenses were dismissed (by the court *sua sponte*) at that juncture of the pre-trial proceedings when the trial appeared to be moving to Richmond and were never subsequently reinstated, appellant concludes that there was no indictment left after the U.S. Code offenses were thereafter dismissed (on motion of the Government). Notwithstanding the possible logic of this strained reasoning, however, it is blatantly clear from the record that the court was not of the impression that the D.C. Code counts had been dismissed,[20] and neither was appellant or the Government.

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[19] In a separate section of his brief (Br. 31-32, Section IV) appellant contends that his conviction must be reversed because it was delivered by jurors who *might have been* exposed to jurors who *might have been* prejudiced by remarks of another judge which *might have been* prejudicial to appellant. Appellant has failed to establish actual prejudice, a failure which is fatal to his contention. Additionally, the record clearly shows that there was in fact no prejudice. Notwithstanding the tenuousness of appellant's argument below, the trial court directed the Jury Commissioner to exclude from the panel all of the jurors who had heard the allegedly prejudicial remark of the other judge and examined the prospective jurors as to whether they had been prejudiced by the remark. Their silence in response to the court's inquiry established the absence of any prejudice (Tr. 189-190). In view of appellant's failure to seek further examination in this area, he is without any basis for asserting that the court's examination was inadequate.

[20] See June 13 Tr. 27, 36, 51-52.

Appellant premises his argument on the assumption that the trial court dismissed the D.C. Code counts of the indictment, referring to the memorandum of June 6 in which the court stated: "The D.C. Code counts (2 and 4) are not transferable[21] and must be dismissed."[22] We submit, however, that the court neither did nor could dismiss these counts.

Rule 48 (b), FED. R. CRIM. P., sets out within carefully defined limits the court's power to dismiss an indictment *sua sponte*, and the "dismissal" which appellant now argues then occurred would clearly have been beyond the court's power[23] under this rule. In recognizing these limits the trial court properly stated in its memorandum that the D.C. Code counts "must be dismissed."[24] The significance of this choice of words be-

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[21] Appellee will not here re-argue its position that these two counts were transferable, but we wish to make it clear that we do not concede the point and that we still rely on the arguments presented to the trial court (June 13 Tr. 36-48).

[22] Appellant also maintains that the Government's response to this memorandum, being entitled "Motion to Reinstate . . .", indicates its concurrence that the counts had been dismissed. Appellee submits that this argument is unwarranted and places undue weight on the technicalities of pleading in conflict with the intended purpose of the motion and the policy established in Rule 2, FED. R. CRIM. P. Moreover, appellant's argument can be used against his related contention that the court's memorandum of June 6 was in fact an order effecting a change in venue. See *United States* v. *Green*, 134 U.S. App. D.C. 278, 414 F.2d 1174 (1969); *cf. United States* v. *Marcello*, 423 F.2d 993, 1003 (5th Cir. 1970). For if the court's memorandum was an "order," then appellant's subsequent pleading seeking to retain this court's jurisdiction should have been entitled a "Motion to Vacate" rather than a "Motion for Leave to Withdraw Motion for Change of Venue . . . ."

[23] The trial court is presumed to act within its powers. 9 WIGMORE, EVIDENCE § 2534 (3d ed. 1940); MCCORMICK, EVIDENCE, § 641 (1954); 1 WHARTON, CRIMINAL EVIDENCE, § 126 (12th ed. 1955).

[24] This language, we submit, was in the form of a directive to the United States Attorney to seek leave of court to dismiss the indictment. Rule 48(a), FED. R. CRIM. P. When the court's statement is so regarded, it becomes apparent that the court was adhering to the rule that prohibits its interference with the United

comes even more apparent when compared with the language chosen to grant appellant's motion for a change of venue: "defendant's motion for change of venue *is granted.*"

Appellant also challenges the form and content of the indictment upon which he was convicted. He claims that Rule 7 (c), FED. R. CRIM. P., was violated when the original four-count indictment was recast into a two-count indictment (to eliminate possible prejudice to appellant by omitting reference to the U.S. Code offenses which had been dismissed)[25] because, as recast, the indictment bore only a typewritten signature of the United States Attorney and the grand jury foreman. Appellant concludes, therefore, that his conviction must be reversed. This conclusion is without merit for four reasons: (1) the indictment originally filed with the court was proper in all respects, and the recast copy of that indictment in no way vitiated the continuing validity of the original;[26] (2) the technical irregularities mentioned by appellant, if indeed they are irregularities at all, were clearly meant to be excluded by Rule 7 (c) as a ground for dismissal of the indictment;[27] (3) appellant was not prejudiced;[28] and (4) appellant's challenge of the indictment is untimely.[29]

States Attorney's prosecutorial discretion. *Newman* v. *United States*, 127 U.S. App. D.C. 263, 382 F.2d 479 (1967); *United States* v. *Cox* 342 F.2d 187 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

[25] See Oct. 17 Tr. 6.

[26] It is clear from the record that the retyped indictment was neither intended nor regarded as a new pleading but merely as a copy of those portions of the original indictment that were still in effect. See 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 127 (1969); 1 ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §§ 7:95, at 121-124 (1966). It is also clear that the copy was prepared with the express consent of appellant's counsel (Oct. 17 Tr. 6).

[27] 1 WRIGHT, *supra* note 26, § 123, at 223, and cases cited therein.

[28] *Smith* v. *United States*, 360 U.S. 1 (1959).

[29] Rule 12(b), FED. R. CRIM. P.; 1 WRIGHT, *supra* note 26, at 225-226.

IV. Evidence of appellant's criminal behavior, occurring only one hour prior to the offenses charged herein and relevant to his intent or state of mind, was properly admitted by the trial court.

(September 8 Tr. 11-13)

Appellant first claims that by reason of the Government's failure to respond to the court's memorandum dated August 7, 1969, he was without notice of the prior criminal acts which the Government intended to introduce on the issue of intent. The August 7 memorandum stated: "If the government proposes to rely on any other prior acts[20] as bearing on intent, it will advise the court and defense counsel by September 2." On September 2 the Government filed its "Notice" stating:

> Pursuant to the requirements of the Court's pretrial memorandum of August 7, 1969, the Government advises the Court, and serves notice upon counsel for the defendant, that its proposes to rely on prior acts other than the defendant's escape from the Lorton Reformatory insofar as they have bearing on the issue of intent in this case.

Appellee submits that a more literal compliance with the court's memorandum was not possible. Subsequently, at a pretrial conference on September 8, the court questioned whether it would "now" be appropriate for the Government to give some indication of what prior acts it proposed to use (Sept. 8 Tr. 11). In response the Government advised that the act in question was the bank robbery on January 8, 1969, for which appellant had been convicted (Sept. 8 Tr. 12-13). In view of the unequivocal status of the record as to these matters appellee sees no need to respond further to appellant's accusation that "[t]he government . . . did not provide defense counsel with *any notice* that the Government would introduce evidence suggesting the commission of

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[20] *I.e.*, other than appellant's escape from Lorton Reformatory on August 23, 1968.

a prior bank robbery by Defendant, for which Defendant *had not been convicted*,[31] indicted, or formally accused" (Br. 33) (emphasis added).

Although appellee agrees with the proposition stated by appellant that the admissibility of evidence of prior crimes, when relevant to intent, must be determined by a balancing of the probative weight of such evidence with its potential prejudice,[32] we do not concur in his conclusion that such balancing of this evidence should result in its exclusion. By reference to MCCORMICK, EVIDENCE § 157, at 332 (1954), appellant urges this Court to consider (1) the Government's need for the evidence relating to the Maryland bank robbery in view of other evidence available, (2) the persuasiveness of the proof that the prior offense in fact occurred and that appellant was the perpetrator, and (3) the probative value of this evidence as to appellant's intent or state of mind. Against the sum of weight attributed to these considerations, appellant asks this Court to balance the prejudicial effect of such evidence.

As to (1): Clearly the Government sought to prove the elements of premeditation and deliberation by establishing that appellant was aware that the authorities had reason to be pursuing him and that he was going to resist apprehension by any feasible means at his command. Concededly, appellant's status as an escapee from Lorton would have been suggestive that he was eager to remain a fugitive, but its weight toward establishing premeditation and deliberation was considerably weaker than evidence of an armed bank robbery less than an

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[31] See footnote 3, *supra*.

[32] *Bradley* v. *United States*, D.C. Cir. No. 20,710, decided November 5, 1969, and authorities cited therein; *Drew* v. *United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

United States v. *Bussey*, D.C. Cir. No. 22,919, decided July 21, 1970, petition for rehearing and suggestion for rehearing *en banc* pending, is distinguishable inasmuch as it concerns the issue of identity as opposed to intent or state of mind; see *Bussey*, slip op. at 6 n.12.

hour prior to the murders. Since appellant had been a fugitive for more than four months, the jurors might readily have concluded, from the remoteness of his escape and his apparent lack of fear of being in the District of Columbia, that avoidance of apprehension was not so dominant in his mind as to have sufficient bearing on the issues of premeditation and deliberation, requisite elements for a conviction of first-degree murder. On the other hand, evidence of the bank robbery on the same day was, we submit, far more compelling and probative of appellant's state of mind.

As to (2): The Government presented two eyewitnesses to the bank robbery, both of whom knew appellant's identity from prior dealings with him as a customer of the bank. Such evidence, we submit, is most convincing that the crime occurred and that appellant committed it.

As to (3): The evidence was uncontroverted that appellant shot the two F.B.I. Agents. His intent was virtually the only contested issue. The Government's theory was that appellant, having robbed the bank, had gone to his apartment to pick up some belongings before escaping to parts unknown and that he was prepared to effect that escape, if necessary, by use of his gun.[33] Having just committed this armed robbery, appellant observed three unknown men conferring next to a car parked the wrong way in a dead-end street adjacent to his apartment building. Moments thereafter, after perhaps first sending away his wife, appellant found these three men at his door. By reference to the evidence of the prior crime the jurors could (and no doubt did) infer that appellant had committed this armed robbery of two bank tellers with whom he had previously dealt, that the robbery had been reported and he had been accused, that these three men were present to apprehend him, and that unless he stopped them he would momen-

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[33] *Cf. Belton v. United States*, 127 U.S. App. D.C. 201, 382 F.2d 150 (1969).

tarily be back in custody. Under these circumstances, this evidence had the utmost probative value as to appellant's intent or state of mind prior to committing these murders and was, we submit, "indispensible" [34] to this issue.[35]

V. The trial court's instructions to the jury were proper.

(Tr. 1027, 1101)

A. Diminished responsibility

Appellant argues that it was error for the trial court to reject his proposed instruction on diminished responsibility. Without pausing to comment on the merits of arguments and authorities supporting this theory, we simply point out that it has been expressly rejected in this jurisdiction. *Fisher* v. *United States*, 328 U.S. 463, 476-477 (1946); *Stewart* v. *United States*, 129 U.S. App. D.C. 303, 394 F.2d 778 (1968); *Stewart* v. *United States*, 107 U.S. App. D.C. 159, 275 F.2d 617 (1960), *rev'd on other grounds*, 366 U.S. 1 (1961).

B. Premeditation and deliberation

Appellant's final contention is that the trial court improperly instructed the jury on the issues of premeditation and deliberation, an argument that appellant supports by an unduly selective extraction [36] of only a por-

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[34] 6 WIGMORE, *supra* note 23, § 1864, at 491.

[35] See *McHenry* v. *United States*, 51 App. D.C. 119, 276 F. 761 (1921); *United States* v. *Puff*, 211 F.2d 171 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954); *Suhay* v. *United States*, 95 F.2d 890 (10th Cir.), *cert. denicd*, 304 U.S. 580 (1938); *People* v. *Combes*, 56 Cal. 2d 135, 363 P.2d 4, 14 Cal. Rptr. 4 (1961) (*en banc*); *State* v. *Simborski*, 120 Conn. 624, 182 A. 221 (1936); *Mackiewicz* v. *State*, 114 So. 2d 684 (Fla. 1959).

[36] "In evaluating an asserted error in a portion of a jury instruction [this Court] must, of course, examine the charge as a whole to determine whether there was a likelihood of misleading the jury to the extent that it is more probable than not that an improper

tion of the court's charge.[37] Remarkably, appellant's reliance on *Austin* v. *United States*, 127 U.S. App. D.C. 180, 382 F.2d 129 (1967), fails to note this Court's reference in that opinion[38] to *Fisher* v. *United States*, *supra*, and the Supreme Court's approval of an instruction containing, virtually verbatim, *but in context*, the language extracted by appellant. Accordingly, we submit that the instruction was proper.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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verdict was rendered." *Thurman* v. *United States*, 135 U.S. App. D.C. 184, 185, 417 F.2d 752, 753 (1969), citing *Suggs* v. *United States*, 132 U.S. App. D.C. 337, 341-342, 407 F.2d 1272, 1276-1277 (1969).

[37] See pp. 15-16, *supra*.

[38] 127 U.S. App. D.C. at 186 and n.12, 382 F.2d at 135 and n.12.

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REPLY BRIEF FOR APPELLANT

In The

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23, 746

United States of America,

Appellee,

v.

Billie A. Bryant,

Appellant.

Appeal from the United States District Court
from the District of Columbia

Lee Loevinger

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Washington, D. C. 20006

Counsel for Appellant
Appointed by This Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

*Cases chiefly relied on are marked by asterisks.

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REPLY BRIEF FOR APPELLANT

Preliminary Statement

A reading of the Brief for the Appellee reveals that the Government has made an inadequate response to the brief for the Appellant. The Government has mistaken several of the Appellant's arguments and been unresponsive to others. This short reply brief is, therefore, necessary.

ARGUMENT

I. As To Trial Without a Valid Indictment.

The Government acknowledges the "possible logic" (Gov. Br.27) of the Appellant's argument but counters that the dismissal of counts two and four did not occur because such a dismissal, ". . . would clearly have been beyond the court's power under this rule." [Rule 48(b) Fed. R. Crim. P.]. (Gov. Br. 28) The Government is apparently under the impression that Rule 48(b) sets forth the sole premise upon which the court may dismiss an indictment sua sponte. This is erroneous. As the Advisory Committee Note indicates, Rule 48(b) "is a restatement of the inherent power of the court to dismiss a case for want of prosecution." Mann v. United States, 304 F. 2nd 394 (D.C. Cir. 1962) citing Note of Advisory Committee, following 18 U.S.C.A., Rule 48. The inherent power in the court to dismiss may be invoked by other circumstances. For example, Rule 12(b)(2) Fed. R. Crim. P. provides, in part: "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." In United States v. Parrott, 248 F. Supp. 196 (D.C. D.C. 1965) the court dismissed certain counts of an indictment under Rule 48 (b) but said:

> In this view of the case, it is not necessary to reach the search and seizure issues under the Fourth Amendment, the due process issues under the Fifth Amendment, or the Sixth Amendment speedy trial issues. Were it necessary to reach these constitutional questions, the result would be the same for these defendants have been denied substantial constitutional rights guaranteed under these Amendments.
> 248 F. Supp. 206

It is plain in the present case from the argument which took place on the Government's Motion to Reinstate (June 13, Tr. 36-49) that the court dismissed counts two and four because trial of the Defendant on the District of Columbia counts in another jurisdiction would have deprived the Defendant of certain statutory rights to which he was entitled under the District of Columbia Code. Such a deprivation would have been a violation of the due process clause and would also constitute a failure of jurisdiction over the subject matter of counts two and four, which failure the court is required to notice at any time.

It should also be noted that in its papers moving for a reinstatement of counts two and four of the indictment and in the entire argument which took place on this motion to reinstate (June 13, Tr. 36-49), the Government failed to make any suggestion of a lack of power in the court to dismiss the nontransferable counts and

argued for their reinstatement upon other grounds. The Government's belated argument that the dismissal was beyond the powers of the court is plainly without merit.

In a footnote (Gov. Br. 28-29, fn. 24) the Government implies that the dismissal by the court was an interference with the United States Attorney's "prosecutorial discretion." This suggestion and the cases which the Government cites in support thereof are inapposite. In this case the court dismissed counts two and four of the indictment because of an infirmity on the face of the proceedings. Concededly the power to move to dismiss, or fail to prosecute for reasons of public policy lies with the Government's attorney. However, this power does not detract from the court's inherent authority to dismiss a proceeding or parts thereof when circumstances indicate that further prosecution will constitute an unconstitutional deprivation of rights or a failure of jurisdiction.

The Government argues that any other infirmities of the indictment caused by recasting, retyping and lack of proper signature are not grounds for reversal because the original indictment remained valid, any irregularities were merely "technical irregularities" and in any case the Appellant was not prejudiced and his objections are untimely. No matter how valid the original indictment, the fact remains that Defendant was not tried upon the original indictment. The irregularities which Appellee calls "technical" were compounded in this case by dismissals of counts two and four. On the face of the record it is clear that confusion was created by the recasting to such a degree that it is difficult to tell exactly under which

indictment and what counts thereof Defendant was being tried and sentenced. See for example the confusion evident upon a comparison of the Grand Jury Indictment of March 5, 1969, the verdict forms of October 27, 1969 and October 28, 1969, the Judgment of Commitment of November 3, 1969 and the Notice of Appeal of November 3, 1969. The Grand Jury Indictment of March 5, 1969, is framed in terms of Counts First, Second, Third, and Fourth. The verdict forms of October 27, 1969, and October 28, 1969, show respectively that the Defendant has been found guilty on Counts One and Two and that the jury is unable to agree on punishment under Counts One and Two. The Judgment and Commitment of November 3, 1969, shows the Defendant convicted on Counts 2 and 4 and sentenced to life on Count 2 and life on Count 4; in the Notice of Appeal the concise statement of judgment is framed in terms of Count One and Two with the "One" and the "Two" stricken and "Two" and "Four" inserted over them; the two dates thereon, October 28, are also stricken and November 3, written in over the stricken dates.

Appellant submits that his challenge is timely for it is only when the errors are reviewed in the context of the entire record that the denial to the Defendant of the right to an orderly trial upon a properly drawn and constituted indictment becomes apparent. The treatise which the Government cites in supports of its untimeliness contention, 1 Wright, Federal Practice and Procedure: Criminal, §123 (1969) and the cases cited therein do not stand for the proposition that such a challenge by Defendant is inappropriate on appeal.

II. As To Change of Venue.

In its brief the Government has chosen to rearrange the Appellant's argument and to deal with subsidary points thereof out of context. This treatment by the Government should not obscure the fact that Appellant's argument rests, in the first place,upon Appellant's constitutional right to a change of venue to remove the trial from the community which has been saturated with publicity adverse to him, Rideau v. Louisana, 373 U.S. 723 (1963), to a locale where the Defendant might be tried in an atmosphere of "judicial serenity and calm," Estes v. Texas, 381 U.S. 532,536 (1965), where even the probability of unfairness would be avoided, Sheppard v. Maxwell, 384 U.S. 333 (1966). The Government must recognize that in cases where there exists in the district where the prosecution is pending so great a prejudice against the Defendant that he cannot obtain a fair trial the court must preserve the Defendant's constitutional rights by ordering a change of venue. However, the Government argues that in this case "Appellant gives no evidence of having met his burden of showing 'that there exist in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair trial . . . .' Rule 21(a) Fed. R. Crim. P." (Gov. Br. 25) The Government implies that the Appellant has not "met his burden" because of the absence of an extensive factual record on the question of pretrial publicity. Of course, there is not an extensive factual record in this case for the simple reason that the motion for transfer of venue was granted without opposition by the Government. Appellant

submits that where (1) the Defendant has alleged "there exists in the district where the prosecution is pending so great a prejudice against the Defendant that he cannot obtain a fair trial," (2) The Government has expressed no opposition to the change of venue (3) the court has granted the motion, citing therein factors indicating wide and persistent publicity adverse to Defendant, and (4) there is some evidence in the record of the wide and persistent adverse publicity (Oct. 17, Tr. 36, Trial Tr. 5) that Appellant has met his burden of showing so great a prejudice against him that he cannot obtain a fair trial. To hold otherwise would impose an impossible burden on an Appellant in a case such as this. After such a decision for a change of venue it is reversible error to conduct a trial in the jurisdiction saturated with adverse publicity.

There remain, however, the questions of why, if there was in fact such a great prejudice against Defendant in this jurisdiction, would he have consented to a trial in the District of Columbia and whether this consent operated as a valid waiver of any constitutional rights to a change of venue. The records show that this "consent" was obtained after the Appellant was informed that unless the trial was held in the District of Columbia Co-Counsel Christensen could not serve as counsel and that the only venue to which the court would allow the case to be transfered was Richmond, Virginia. The Government has stated ". . . method or timing of an appointment may, irrespective of the identity of appointed council, support a finding of ineffective assistance in advance of trial. See Powell v. Alabama, 287 U.S. 45

(1932)" (Gov. Tr. 22 fn. 12). It is Appellant's submission that in this case because Mr. Christensen had been appointed immediately following the crime and worked to develop the psychological studies which were immediately performed upon the Appellant, the expertise which he had developed was virtually irreplaceable. The purpose of the mental examinations was to establish Appellant's mental soundness and mental capability as of the time of the alleged crime. Expertise equivalent to that gained by Mr. Christensen in conducting the interviews and assisting in the examination of Defendant during a period close to the time of the confrontation could not by reason of passage of time be obtained by an attorney appointed to the case months after the occurrence.

Appellant argues that his rights under the Fifth and Sixth Amendments to a change of venue, when construed together with those under the Sixth to a trial in the state and district wherein the crime was committed, made it impermissible for the court to condition a change of venue or transfer to Richmond, Virginia. Appellee merely replies that Rule 21(a) Fed. R. Crim. P. forecloses his argument. The Appellee evidently assumes that the extent of Appellant's constitutional rights are defined in this instance by the Federal Rules of Criminal Procedure. The Appellant rejects that contention. As Mr. Justice Black said in dissenting to the Order of the Supreme Court of February 28, 1966, which made certain Amendments in the Federal Rules of Criminal Procedure:

> I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all constitutional. For such a decision would be the equivalent of an advisory opinion which, I assume the Court would unanimously agree, we are without constitutional power to give. 383 U.S. 1031,1032 (1966)

III. As To The Selection of Jurors.

The Appellant is correct in noting that recommendation for individual examinations of prospective jurors as set forth in Patriarca v. United States, 402 F. 2nd 314 (1st Cir. 1968), United States v. Marcello, 280 F. Supp. 510 (E.D.La. 1968), affirmed 423 F. 2nd 993 (5th Cir. 1970) and the A.B.A. recommended minimum standards is, ". . . based on the premise of probable prejudice of the jurors from exposure to publicity." (Gov. Br. 18). Appellant's argument that it was necessary to meet this standard in the instant case in order to provide a fair trial is not blunted by Appellee's characterization of it as "conclusory" (Gov. Br. 18). A strong indication of the necessity for individual voir dire in a case such as this is indicated by the Government's remarks in footnote 19 of its brief (Gov. Br. 27).

There the Government stated in response to Appellant's contention that his conviction must be reserved because the court drew a jury from a group of jurors which had been misled or contaminated by the prejudicial remark of another judge:

> . . ., the trial court directed the Jury Commissioner to exclude from the panel all the jurors who had heard the allegly prejudicial remark of the other judge and examined the prospective jurors as to whether they had been prejudiced by the remark. Their

silence in response to the court's inquiry established the absence of any prejudice . . . ." (Emphasis supplied)

The very point which Appellant relies upon in his argument as to voir dire is that silence in response to an en masse question of prejudice does not necessarily show a lack of prejudice nor does silence in response to an en masse question of exposure to prejudicial publicity establish a lack of such exposure. The only way in which the court and counsel may adequately determine the existence of residual prejudice is by a series of questions to individuals and the verbal responses which would be received under a system of individual voir dire.

It should be made clear that in his appeal Appellant has argued that his conviction must be reversed because the district court denied him the right to interrogate prospective jurors individually on voir dire. Such a challenge, of course, encompasses the failure to interrogate jurors individually who indicate some response to an en masse initial question of publicity but are never examined at the bench. Any implication of the Government (See Gov. Br. 19 footnote 7) that such a challenge is not entailed in Appellant's argument is erroneous.

IV. As To The Proposed Instruction Regarding Defendant's Mental Condition As Precluding Premediation.

The Government points out that the doctrine of diminished or partial responsibility has not yet been adopted as the law in the

District of Columbia. Appellant's argument does not challenge this observation. However, Appellant does submit that in a jurisdiction which allows the jury to consider the effect of intoxication upon a defendant's ability to form a specific intent it is inconsistent not to allow a consideration of the effect of a defendant's mental condition as it bears upon his ability to form the necessary intent, to premeditate and deliberate. In regards to Fisher v. United States, 328 U.S. 463 (1946), Appellant does point out the following statement by Mr. Justice Reed in delivering the opinion of the Court:

> We express no opinion upon whether the theory for which petitioner contends should or should not be made the law of the District of Columbia. Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District. 328 U.S. 476.

CONCLUSION

For the reasons stated in Appellant's Brief and under each of the points above, Defendant's conviction must be reversed.

Respectfully submitted,

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